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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. .....

SHELL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION, TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS & ELECTRIC COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in case No. 12,568 on June 15, 1961.

Opinions Below.

The opinion of the Court of Appeals (*infra*, pp. A-1-A-8) is not yet reported. The orders of the Federal Power Commission (R. 133-145, 153-161) are reported at 18 F. P. C. 617 and 19 F. P. C. 74.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 15, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) and §19(b) of the Natural Gas Act, 15 U. S. C. §717r(b).

Questions Presented.

In passing on the enforceability of a privately negotiated gas purchase contract which was executed by the seller in Texas and thereafter by the buyer in the District of Columbia, but which was to be performed wholly in the State of Louisiana and which was on file with the Federal Power Commission as a rate schedule under the Natural Gas Act, the Court of Appeals resolved the issue on the basis of federal substantive law (which it characterized as "general contract doctrine", *infra,* p. A-7) rather than on the basis of the law of Louisiana. In so doing, the court found it unnecessary to discuss the law of Louisiana which it assumed to be the same as the general contract doctrine which it applied.

The questions presented are:

1. Whether enforceability of a privately negotiated contract for the sale of natural gas to be performed in the State of Louisiana, and which contract is filed with the Federal Power Commission as a "rate schedule" pursuant to the Commission's regulations under the Natural Gas Act, is governed by the law of Louisiana (the place of performance) or by federal substantive law.

2. Whether, assuming Louisiana law governs, the Court of Appeals erred in assuming Louisiana law to be the same as federal substantive law and that Louisiana law "does not differ from general contract doctrine" (*infra,* p. A-7).

3. Whether, assuming Louisiana law governs, federal court action should be held in abeyance until the issue of enforceability is resolved by the Louisiana court in a pending case between Shell and Texas Gas involving that very issue.

Statement.

This case was previously before this Court in *Texas Gas Transmission Corporation, et al.* v. *Shell Oil Company*, 363 U. S. 263 (1960). The judgment below resulted from further proceedings in the Court of Appeals as a result of this Court's reversal and remand of a previous judgment by that Court.

The ultimate issue is what was the effective price on June 7, 1954 under a 1951 gas sales contract between Shell, seller, and Texas Gas' predecessor, buyer.[1] The dispute centers on whether the price escalation clause in the Shell contract was activated by an agreement dated February 17, 1954 between Texas Gas and The Atlantic Refining Company.

The price escalation clause in the 1951 Shell contract provides (R. 63-64):

> "3. If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller of such fact, and if the price per one thousand (1000) cubic feet at any time payable under such other contract is higher than

[1] Louisiana Natural Gas Corporation (a wholly owned subsidiary of Texas Gas) was the original buyer in the Shell contract. The corporations merged in 1955 (R. 134). The buyer will be referred to as Texas Gas or the pipeline.

> the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. * * *"

At the time of entry into the 1951 Shell contract, Texas Gas was also buying gas in the same area from The Atlantic Refining Company under a contract (the "Atlantic contract") which had been executed on September 1, 1943.[2] The Atlantic contract covered gas to be produced from the North Tepetate Field, Acadia Parish, Louisiana, with the gas to be delivered at a central point in that field (R. 82). The Atlantic contract was executed by Atlantic on September 11, 1943 in Dallas County, Texas, and by Defense Plant Corporation on September 17, 1943 in the District of Columbia (R. 97-98).

The Atlantic contract, which provides that "the rights of the parties" are to continue for the producing life of the field but not to exceed 25 years (R. 92), fixed a definite price for the first five years (R. 86) but no price was fixed for subsequent periods. Rather, the contract provided (R. 87):

> "(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

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[2] Initially this contract was between Atlantic, seller, and Defense Plant Corporation, buyer, but Texas Gas through its subsequently-merged subsidiary had acquired all of the rights and assumed all of the obligations of Defense Plant Corporation on May 11, 1949 (R. 109-110).

"(c) During succeeding five-year periods prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

"(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII."[3]

By written agreements the parties to the Atlantic contract agreed upon the price for gas to be paid during the second five-year period of the contract (R. 99-100, 102-109). In fixing the price for the second five-year period it was agreed that such fixed price would expire on August 31, 1953 (R. 104). By letter dated August 27, 1953 (four days before the prior price agreement terminated) Texas Gas wrote to Atlantic advising that the prior price provisions

[3] Condition XII reads (R. 93-94):

"* * * The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrators shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.

"* * * The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same."

would expire on August 31, 1953, and notified Atlantic of its willingness to commence negotiations concerning the price for the succeeding five-year period (R. 30-31). Commencing in September 1953 negotiations took place looking toward agreement on price between Atlantic and the pipeline. At least four meetings were held and there were numerous telephone conversations. Negotiations stretched over a period of approximately five and one-half months and finally culminated in a written agreement dated February 17, 1954 (R. 17, 37-38). This agreement fixed the price at 12.2¢ per Mcf, plus tax reimbursement, for the period beginning September 1, 1953 and ending August 31, 1958. At that time Shell was receiving 8.997¢ per Mcf for its gas being delivered to the pipeline. The February 1954 agreement, which petitioner contends activated the Shell price escalation clause, reads as follows (R. 37-38):

> "Under date of September 1, 1943, Defense Plant Corporation, as Buyer, entered into a gas purchase contract with The Atlantic Refining Company, as Seller, for the purchase of gas produced from Seller's leases in the North Tepetate pool of Acadia Parish, Louisiana, which contract was subsequently amended February 16, 1949. Louisiana Natural Gas Corporation purchased the pipe line operated by Defense Plant Corporation and the aforesaid contract with The Atlantic Refining Company was assigned to Louisiana Natural Gas Corporation.
>
> "In accordance with Paragraph III of said contract, it is hereby agreed that the price to be paid by Louisiana Natural Gas Corporation to The Atlantic Refining Company for gas sold and delivered under such contract between September 1, 1953, and August 31, 1958, both inclusive, shall be 12.2 cents net for each 1,000 cubic feet at a pressure base of 15.025 psia of gas received at the central point or points set forth in the original contract, regardless of whether such gas is delivered to a government plant or not; and,

> in addition, Buyer shall reimburse Seller for all State severance taxes, or similar taxes, which Seller is obligated to pay and has paid to the State of Louisiana on such gas."

Pursuant to the Commission's regulations, Shell filed its 1951 contract as a rate schedule, claiming that its effective rate on June 7, 1954 was the same as that specified in the February 17, 1954 agreement. The Commission set the matter for hearing to determine the effective June 7, 1954 rate under the Shell contract (R. 116-117). The Presiding Examiner agreed with Shell, concluding that the February 17, 1954 agreement activated the Shell price escalation clause (R. 118-133). The Commission reversed its Examiner (R. 133-145, 153-161). The Court of Appeals vacated the Commission's order and remanded to the Commission for further proceedings (263 F. 2d 223). This Court granted certiorari (*Texas Gas Transmission Corporation, et al. and Federal Power Commission* v. *Shell Oil Company*, 361 U. S. 811), reversed the judgment of the Court of Appeals, and remanded for further proceedings (363 U. S. 262, 277).[4]

On remand, the court below concluded that the enforceability issue was most material, but affirmed the order of

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[4] In the course of the opinion, and with respect to the remand, this Court stated (363 U. S. 276-277):

> "There remains for mention an argument of Shell which the Court of Appeals found unnecessary to consider because of the rationale which it adopted. This is the contention that the 1943 Atlantic agreement did not provide for a fixed and determined price beyond the first five-year period, so that under applicable state law enforceability was suspended until the contract price for a particular succeeding five-year term was supplied by agreement or arbitration. From this premise it is argued that when the second five-year period came to an end on August 31, 1953, neither Atlantic nor Texas Gas was under any enforceable obligation to continue the prior relationship and therefore when on February 17, 1954, Texas Gas signed the letter agreement it was not acting pursuant to any pre-existing obligation but was exercising its free choice to enter what was in effect a new contract. In its petition for writ of certiorari the Commission argued that not only was there no doubt about the

the Commission. The Court of Appeals observed that its primary responsibility was to determine whether the 1943 Atlantic contract was enforceable as to its third five-year term. The court stated that "[t]he answer to this lies in the pact's arbitration clause", *infra*, p. A-5. The court below concedes that Shell's contention as to the unenforceability of the Atlantic contract would be correct if the arbitration procedure provided for in the Atlantic contract might never have resulted in an accepted price. *Infra*, p. A-5. The court also clearly indicates that if Shell's contention as to the unenforceability of the Atlantic con-

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enforceability of the Atlantic contract but that the issue is immaterial because the parties to that contract treated the contract as binding and that it is not for Shell, a stranger to the contract, to say that it was not legally enforceable. However, the Commission suggested that should we reverse the decision of the Court of Appeals, premised as it is upon the assumption that the 1943 Atlantic contract imposed a binding obligation for its entire stated term, and if we considered the question of enforceability to be material, we should remand the issue of enforceability to the Court of Appeals for its decision. Shell has maintained in this Court that the issue of enforceability is material but, in view of the Commission's statement has argued neither that issue nor the issue of enforceability. We agree that it is appropriate that the Court of Appeals address itself to the enforceability issue, if it is material, but under the circumstances we think the Court of Appeals should first decide the question of materiality.[11] We therefore reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion."

"[11]. We do not read the following statement of the Court of Appeals as foreclosing the Commission's argument that the issue of enforceability is not material:

" 'We have assumed without deciding that the Atlantic contract of 1943 did in fact impose a binding agreement-to-agree on the price for gas in each of the contract's last four five year periods. Thus it has not been necessary to determine the several questions raised in connection with the arguments directed to that phase of the case. Of course if the Atlantic contract of 1943 was not a binding agreement-to-agree, that circumstance alone would place the February, 1954 Atlantic contract fully within the terms of the escalation clause in the Shell contract.' 263 F. 2d, at 226."

tract is correct, then the February 1954 agreement satisfied the Shell clause, *infra*, p. A-2, fn. 3.

The Court of Appeals appears to resolve the issue on the basis of federal substantive law which it characterized as "general contract doctrine", rather than upon the basis of the law of Louisiana. With such general contract doctrine as its basis, the Court reasoned that by the mere presence of an arbitration clause in the Atlantic contract "* * * the parties accept a definite standard under which the gas price will be established directly within the contract area", *infra*, p. A-6.

With reference to our contention that Louisiana law governed the enforceability issue, the Court of Appeals stated (*infra*, p. A-7):

> "Much is said in the case on the question of whether Louisiana law governs enforceability of the contract but under our conception of the controverted document, Louisiana law, in this instance at least, does not differ from general contract doctrine. Therefore, abstract discussion of whether Louisiana law controls the enforceability of the Atlantic pact is not called for. Circumstances considered, the Atlantic-Texas Gas agreement does contain a valid, workable price-fixing standard."

Reasons for Granting the Writ.

1. The Question of What Law Governs the Enforceability of a Privately Negotiated Gas Sales Contract On File as a Rate Schedule with the Federal Power Commission is of Major Importance in the Administration of the Natural Gas Act and in the Applicability of Federal Substantive Law as Against State Law.

Since mid-1954 when this Court decided *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672 (1954), thousands of independent producer gas sales contracts have been filed

as "rate schedules" with the Federal Power Commission. The interpretation and enforceability of such "rate schedules" have been and will continue to be the subject of controversy before the Commission and the Courts. In fact, the recurrence of such questions before the Commission was urged by respondents in support of their successful petitions for writs of certiorari previously filed in this very case.[5]

The question of what law was applicable was strenuously argued to the court below. The respondents strongly urged that the question presented was a federal question which should be resolved in accordance with federal substantive law. This contention was based primarily upon the circumstance that a federal agency (Defense Plant Corporation) was initially a party to the Atlantic contract, hence any question arising at any time as to the interpretation or enforceability of that contract presented a question which should be resolved pursuant to federal substantive law. In this connection respondents relied primarily upon *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943) and *American Houses, Inc.* v. *Schneider*, 3 Cir., 211 F. 2d 881 (1954). Respondents also relied upon the Federal Arbitration Act, 9 U. S. C. §§1-14.[6] Shell has contended throughout that Louisiana law governed.

The Commission itself discussed the conflict of laws question in its order. It appears to have felt that the law of the District of Columbia should govern (R. 140-141,

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[5] See note ** pp. 6-7 of Petition for Writ of Certiorari, *Texas Gas Transmission Corp., et al.* v. *Shell Oil Co.*, No. 167, October Term, 1959; and note 13, p. 13 of Petition for Writ of Certiorari, *F. P. C.* v. *Shell Oil Co.*, No. 170, October Term, 1959.

[6] Brief for Federal Power Commission in court below, pp. 13-20; Brief for Texas Gas *et al.* in court below, pp. 27-30. Respondents also contended below that they should prevail even if Louisiana law applied, but their principal contention appears to have been that the question should be resolved in accordance with federal substantive law.

and footnote 4), although it did state that it would reach the same result even if it applied the law of Louisiana (R. 141).

The Court of Appeals appears to have rejected, or deemed unnecessary to decide, our contention that Louisiana law governed. Rather, the court below based its conclusion on its conception of federal substantive law which it characterized as "general contract doctrine", and then erroneously assumed that it was unnecessary to discuss whether Louisiana law controls, because it said that in this instance Louisiana law does not differ from "general contract doctrine", *infra*, p. A-7.

We shall show later (*infra*, pp. 12-21) that the court below was seriously mistaken in its conception of the law of Louisiana. But primarily the question which we ask this Court to review is whether federal substantive law or State law should govern in determining the enforceability of a contract which is to be wholly performed in the State of Louisiana and which is on file with the Federal Power Commission as a rate schedule.[7]

The decision below stands as authority for the proposition that federal substantive law, or some nebulous general common law, rather than the law of the State of performance, governs the enforceability of a contract on file with the Commission as a rate schedule. This precise issue—although of far-reaching importance—has not been, but should be, resolved by this Court.

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[7] The doctrine of the *Clearfield* case, *supra* (318 U. S. 363) has no application here, as the federal agency had completely divested itself of all interest in the Atlantic contract long prior to the February 17, 1954 agreement. See *Bank of America* v. *Parnell*, 352 U. S. 29 (1956). Nor does the Federal Arbitration Act, even if applicable, settle the outcome if Louisiana law applies. At most, that Act would assure arbitration but would not assure fixing of price. Under Louisiana law the Atlantic contract was subject to a suspensive condition despite the assurance of arbitration, *infra*, pp. 15-21.

2. To the Extent the Court of Appeals Considered Louisiana Law, Its Decision is in Direct Conflict with the Decisions of the Supreme Court of Louisiana, with the Provisions of the Louisiana Civil Code, and with Established Principles of Civil Law which Apply in Louisiana.

The general importance of the question of what law—federal substantive or State—governs enforceability of a rate schedule on file with the Commission should, of itself, warrant granting the writ. Equally significant, however, is the fact that the court below assumed that Louisiana law is the same as "general contract doctrine", *infra,* p. A-7. The Court of Appeals reasoned that the mere presence of the provision for arbitration in the Atlantic contract made that contract enforceable as a contract to sell gas for each of its five-year periods after the first. That conclusion is contrary to the rule in Louisiana and if permitted to stand will likely result in conflicting decisions by federal and state courts, because as will be shown, the precise question is pending before the Louisiana court in a case between Shell and Texas Gas, intervenor here, involving the same contract applicable to the period prior to June 7, 1954.

Throughout this litigation Shell's principal contention has been that the law of Louisiana governed the enforceability issue, because Louisiana is the place of performance and the place where all material factors attending the Atlantic contract take place. The contract is a contract to sell certain daily quantities of gas having its situs in Louisiana and to be produced and delivered in Louisiana. Under Louisiana law it is abundantly clear that the Atlantic contract was not enforceable for any of its five-year periods after the first, because there was no fixed and determined price, hence the contract was subject to a "suspensive" condition, *infra,* pp. 15-21, and was of no

effect whatever, for any purpose, until the price was actually fixed. When that was accomplished by virtue of the February 17, 1954 agreement, a contractual obligation to sell and to buy gas was created. Such agreement fully satisfied the Shell price escalation clause.

The law of Louisiana is unique, having its foundation in the civil law of Rome and France.[8] That law requires that in a contract of sale (a sale) or in a contract to sell, the price must be certain, that is, fixed and determined. Neither a purported sale nor a purported contract to sell is enforceable or of any legal effect until the price is fixed, and that is true even though the contract contains an enforceable arbitration clause.

Under Louisiana law the same requirement as to price applies to contracts to sell as applies to sales, and the term "contract of sale" means "sale".[9] The Louisiana Civil Code[10] makes this clear in LSA-C. C. Art. 2439 which provides:

> "The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself.
>
> "Three circumstances concur to the perfection of the contract, to wit: the thing sold, *the price* and the consent." [10a]

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[8] The Cival Code of Louisiana is based upon the civil law of Rome and France. See, *Viterbo* v. *Frielander*, 120 U. S. 707 (1887). The Articles on sales and contracts to sell, with which we shall deal, are taken, except for minor verbal changes, from the Code Napoleon of France. See Hebert and Lazarus, *Some Problems Regarding Price in the Louisiana Law of Sales*, 4 Louisiana Law Review 378 (1942), discussed *infra*.

[9] Hebert and Lazarus, *Some Problems Regarding Price in the Louisiana Law of Sales*, 4 La. Law Rev. 378, 381, n. 15.

[10] The Louisiana Civil Code is cited herein as LSA-C. C., followed by the Article number.

[10a] Emphasis supplied here and throughout.

The term "promise to sell" does not refer to a sale, but, as the term indicates, refers to a contract to sell, and such a contract is not enforceable or effective until the price has been agreed upon. LSA-C. C. Art. 2462 makes this clear:

> "A promise to sell, when there exists a reciprocal consent of both parties as to the thing, *the price* and terms, and which, if it relates to immovables, is in writing, so far amounts to a sale, as to give either party the right to enforce specific performance of same."

The same is true of a sale. LSA-C. C. Art. 2456 reads:

> "The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid."

LSA-C. C. Art. 2464 states, in part:

> "The price of the sale must be certain, that is to say, fixed and determined by the parties."

In LSA-C. C. Art. 1764 it is provided:

> "All things that are not forbidden by law, may legally become the subject of, or the motive for contracts....
>
> "1. That which is the essence of the contract, for the want whereof there is either no contract at all, or a contract of another description. Thus a price is essential to the contract of sale; if there be none, it is either no contract, or if the consideration be other property, it is an exchange."

The Louisiana courts have adhered rigidly to the requirements of these Articles.

In *Patton's Heirs* v. *Moseley*, 186 La. 1088, 173 So. 772, 774 (1937), the Court held:

> "In the contract of sale it is essential that the price be certain—fixed and determined between the parties. Civil Code Arts. 1764, 2439, 2464, *Wise* v. *Guthrie*, 11 La. Ann. 91; *Prude* v. *Morris*, 38 La. Ann. 767; *Pulford* v. *Dimmick*, 107 La. 403, 31 So. 879."

We do not maintain that in a contract of sale (a sale), or in a contract to sell, Louisiana law does not permit the price to be left to the arbitration of a third person. LSA-C. C. Art. 2465 recognizes that this can be done. But in such event, the sale or the contract to sell does not come into existence and is of no effect whatever until the arbitrator actually fixes the price. LSA-C. C. Art. 2465 provides:

> "The price, however, may be left to the arbitration of a third person; but *if such person can not, or be unwilling to make the estimation, there exists no sale.*"

Under the Louisiana law, the 1943 Atlantic contract, since it did not provide a fixed and determined price, was clearly subject to a "suspensive" condition which prevented the contract to sell from coming into effect as to each of its five-year periods after the first until the condition was performed.[11]

It is true that in the Atlantic contract the price issue could be arbitrated provided some act of volition was exercised by one of the parties who might see fit to invoke

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[11] The Louisiana and civil law "suspensive condition" is similar to the condition precedent at common law. *City of New Orleans* v. *Texas & Pacific Ry.*, 171 U. S. 312, 334 (1898).

the arbitration procedure.[12] Arbitrators were not named in the Atlantic contract, nor did either party seek to invoke arbitration. Even if arbitrators were subsequently appointed by the parties, there is no certainty at all that they would ever be able or willing to fix a price, or that *the required majority of the three* would ever decide upon the same price. The Commission expressly recognized, as it must, that this could be so (App. 156).[13]

It is evident that the primary event (agreement upon price) and the alternative event (price agreement by arbitrators) upon which the contract was conditioned in order to become effective after August 31, 1953, was each at least uncertain, thus making the future buyer-seller contractual relationship dependent upon a suspensive condition. That being so, no legally enforceable or effective contract to sell gas after August 31, 1953 came into existence until the condition was furnished by the agreement fixing the price.

The Louisiana Civil Code defines the "suspensive" condition and the effect flowing therefrom as follows:

LSA-C. C. Art. 2021 provides:

> "Conditional obligations are such as are made to depend on an uncertain event. If the obligation is

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[12] The arbitration procedure could be put into effect only if one of the parties designated its arbitrator and so notified the other. Nor could a court name the arbitrators. The Senior Judge of the 5th Circuit was empowered to designate a third arbitrator only in the event the other two could not agree upon a third (see footnote 3, *supra*).

[13] In its order denying rehearing the Commission said (R. 156): "Shell points to the possibility that the arbitrators, even if properly appointed, may not agree on a price. We must assume this is a possibility, but that does not mean that there exists no contractual right to go to arbitration in order to have the price determined." In this respect the Commission confuses the availability of arbitration with a legally enforceable contract to sell gas. The Court of Appeals fell into the same error.

> not to take effect until the event happens, it is a suspensive condition; if the obligation take effect immediately, but is liable to be defeated when the event happens, it is then a resolutory condition.'"[14]

LSA-C. C. Art. 2043 reads:

> "The obligation contracted on suspensive condition, is that which depends, either on a future and uncertain event, or on an event which has actually taken place, without it being yet known to the parties.
> "*In the former case, the obligation can not be executed till after the event . . . .*"

LSA-C. C. Art. 2471 treats specifically of a sale made dependent upon a suspensive condition. That Article states:

> "A sale, made with a suspensive condition, does not transfer the property to the buyer, until the fulfillment of the condition."

In *Barber Asphalt Paving Co.* v. *St. Louis Cypress Co.*, 121 La. 152, 46 So. 193 (1908), the Louisiana Supreme Court reviewed the law on suspensive conditions, including an analysis of the Roman and French law from which the foregoing Codal Articles are taken, saying (46 So. at p. 197):

> ". . . When a sale is made under a suspensive condition, *there is no sale until the condition has been fulfilled . . .*

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[14] The term "obligations" as used in the Louisiana Civil Code is synonymous with contract. *Morgan's La. & T. R. & S. S. Co.* v. *Stewart*, 119 La. 392, 44 So. 138, 143 (1907): "Civil obligations . . . are of two kinds: (1) . . . , (2) Such as arise from the consent of the parties who are bound by them which are called contracts or conventional obligations". See also 58 C. J. S., *Modern Civil Law*, p. 840, "The law of obligation has a broader meaning in the civil law than in the common law in that 'it signifies rights as well as duties . . .' ."

> "Article 2021 of the Code says that an obligation under a suspensive condition 'cannot take effect,' and article 2043, that it 'cannot be executed,' until after the happening of the event upon which it depends. *By this is meant that the obligation cannot have any effect whatever, for any purpose; in other words, that, strictly or logically speaking, it does not exist.*
>
> "From the days of Justinian, the civilians have recognized that an obligation contracted under a suspensive condition, or condition precedent, does not exist before the fulfillment of the condition . . ."

After quoting from the Roman authorities, the Court continues (46 So. at p. 197):

> "Thus it is seen that in such a case the debt, or, in other words, *the contract, or the sale, does not come into existence until the happening of the condition; and that in the meantime there is only a hope that it will come into existence.*"

As has been shown, a contract to sell or a sale requires the price to be fixed and determined by the parties. LSA-C. C., Art. 2465, says the price may be left to the arbitration of a third person, "*but if such person can not, or be unwilling to make the estimation, there exists no sale.*" These words will instantly impress anyone as meaning that there can be no sale or contract to sell until the arbitrator acts; otherwise, the emphasized phrase is meaningless.

Thus the provisions of the Louisiana Civil Code and the jurisprudence of that State leave no room for doubt that the fixing of the price, even where it is left to the arbitration of a third person, is an absolute condition the satisfaction of which is prerequisite to the existence of the contract to sell or to a sale. It is the fixing of the price, when that ment is left to future agreement or arbitration, which supplies the condition. Without it, the Court says in *Barber*

Asphalt, supra, the contract "*cannot have any effect whatever, for any purpose*" (46 So. at p. 197).

The Louisiana law on sales and contracts to sell is completely covered and exhaustively documented with Louisiana, Roman and French authorities in "*Some Problems Regarding Price in the Louisiana Law of Sales*", an article written by Paul M. Hebert, Dean and Professor of Law, Louisiana State University Law School, and Carlos E. Lazarus, Visiting Assistant Professor of Law, Louisiana State University, published in 1942 and appearing in 4 Louisiana Law Review 378-418. This treatise demonstrates the following principles applicable in Louisiana:

> (a) There cannot be a valid sale or contract to sell unless the parties have agreed to a fixed and determinate price (p. 388);
>
> (b) Where ascertainment of price is left to future agreement of the parties or to be fixed by third persons, the price is not fixed or determinate, but is dependent upon a suspensive condition (pp. 379-380, 396-399, 402, 403, 409);
>
> (c) Where the price is to be fixed by agreement of the parties or by third persons not named in the act, and thus is subject to a suspensive condition, no sale or contract to sell exists until the parties have actually agreed upon the price or the third parties have actually fixed the price (pp. 402-404).

Dean Hebert and Professor Lazarus, after pointing out that under the Roman law there could be no sale unless the price was fixed with certainty, state (p. 380):

> "It is significant that the modern civil law of sales, as embodied in the Code Napoleon and in its offspring the Louisiana Civil Code, still adheres to * * * basic principles of Roman law."

A section of the article is devoted to "*Determination of Price by Parties or by Third Persons*" (p. 396). After observing that LSA-C. C. Art. 2464 requires the price to be "fixed and determined" and that Art. 2465 provides that price "may be left to the arbitration of a third person", the writers ask whether the latter Article is an exception to the former. In other words, is the requirement of a price fixed and determined "*by the parties*" (LSA-C. C. Art. 2464) dispensed with when the contract provides that the price is to be left to the arbitration of a third person as authorized by Art. 2465? With the French law as their authority, the authors answer this question as follows (p. 397):

> "At first blush, it would seem that Article 2465 makes an exception to Article 2464, but upon closer examination it is clear that it is only the parties themselves who may fix the price for they alone are the parties to the contract. It cannot be logically contended that a stranger to the contract could dictate the price which would be binding on the parties unless they had so agreed, that is, unless they had appointed him for the purpose of fixing the price. The third party is thus the mandatary of the parties, and as such, his act in fixing the price is the act of the parties themselves."

The article continues (p. 397):

> "Ordinarily the stipulation leaving the price to the arbitration of a third person also names the person or persons charged with that duty, and in such a case the parties are bound by the contract for whatever price the appraisers shall fix. *However, the appraisers may not be able or may even refuse to fix the price, in which event Article 2465 provides that there is no sale. Thus the sale is subordinated to the condition, suspensive in character, that the*

price shall be fixed and as long as the price remains undetermined the sale remains inoperative."

It is thus clear that if Atlantic and the pipeline had been unable to finally trade out and agree upon a price as they did, and had the matter instead been submitted to arbitration, an effective contract to sell could not have come into existence unless and until the arbitrators had actually fixed the price. But there is no assurance that that would ever have come to pass. And under Louisiana law it is clear that the contract was of no effect whatever, for any purpose, until the price was actually fixed. Therefore, the conclusion of the Court of Appeals that the mere presence of the arbitration clause in the Atlantic contract insured the fixing of an accepted price and hence made the contract enforceable, is contrary to settled Louisiana law.[15]

3. If the Court agrees that Louisiana law governs, federal court action should be held in abeyance until the issue of enforceability is resolved by the Louisiana court in a pending case between Shell and Texas Gas involving that very issue. Otherwise, there may be a conflict between Federal and State decisions.

There is now pending in the State court of Louisiana a case between petitioner and Texas Gas[16] wherein the precise issue remaining to be decided here, assuming Louisiana law governs, will be among those to which the State court

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[15] See also, *Lake* v. *LeJeune*, 226 La. 48, 74 So. 2d 899 (1954), in which the Supreme Court of Louisiana held that an option to purchase was a *nullity* because of the absence of a fixed and determined price, even though the option purchase contract contained a provision for the appointment of appraisers and the court construed the contract to mean that *either* party alone could designate the appraisers.

[16] *Shell Oil Company* v. *Texas Gas Transmission Corporation*, No. 392-748 on the docket of Civil District Court for the Parish of Orleans, State of Louisiana, filed in July, 1961.

will be required to apply the statutes and laws of Louisiana. Here the question is the price of gas under the Shell contract on June 7, 1954, the date as of which the Federal Power Commission assumed jurisdiction of sales by independent producers. In the State court, Shell sues for $117,584.85, representing the difference between 12.5 cents per Mcf, the escalated price, and 8.997 cents per Mcf, the price before escalation, for all gas delivered to Texas Gas from September 1, 1953 to June 7, 1954. The prior price agreement under the Atlantic contract terminated August 31, 1953 and Shell claims escalation was activated by the agreement on price between Atlantic and Texas Gas dated February 17, 1954 for the period starting September 1, 1953. In order to pass on Shell's demand, the Louisiana court must determine in accordance with Louisiana law the very question of enforceability which this Court found remaining for determination in this case.

The applicable State law is a rule peculiar to Louisiana and is fully set forth in the Articles of the Louisiana Civil Code quoted in other parts of this petition. Those Articles taken literally make clear to us that the agreement of February 17, 1954 activated the Shell escalation clause. If, however, in light of the foregoing authorities, any question as to applicable Louisiana law can possibly be considered unresolved, we respectfully submit that the question should be passed upon and determined by the Louisiana court.

The case pending in Louisiana will in any event move forward to final determination by the Louisiana Supreme Court. The decision by a Federal court with a later decision by the Louisiana court, possibly arriving at a contrary conclusion, would bring about the area of friction between the State and Federal judiciaries which this Court

has said should be avoided. *Leiter Minerals, Inc.* v. *United States,* 352 U. S. 220 (1957).

We are mindful that there is no constitutional question involved here. We are also mindful that this Court has refused, in diversity of citizenship cases, to allow the difficulty of an issue of State law to deter it from deciding the case. *Propper* v. *Clark,* 337 U. S. 472 (489) (1949). That principle is no obstacle to the course we ask the Court to pursue here; for in diversity cases a litigant has a choice of forum and his choice of the Federal forum would be frustrated if the Court should seek to refer issues to the State Court.

This suggestion is in accord with the action of the Court in *Thompson* v. *Magnolia,* 309 U. S. 478 (1940), where the court, in bankruptcy litigation, referred to the Illinois State court the issue of whether certain instruments were grants of easements or transfers of fee title. Here, as there, we have but a single issue of law to be decided. There may have been other issues present in this case but there is left only the one remaining issue of whether termination of a price period terminated or suspended the enforceability of the contract until a new price was arrived at by agreement or arbitration. We need no excision of issues by the Court for reference to the State court.

Even more important, here as in the *Magnolia* case, the determination of the issue of State law is an accident of Federal jurisdiction rather than of part of the essence of its responsibility imposed upon it by Congress. In diversity cases and federal question cases Congress must of necessity have realized that issues of State law would be presented for resolution by the Federal courts in exercise of the jurisdiction conferred upon them by the Judiciary Act. 28 U. S. C. 1331. That is not so in bankruptcy

jurisdiction where the Court's chief function is to pass upon claims of bankruptcy, marshal the assets, arrange the order of creditors, and the like, and questions of State law are usually incidental to its function and are accidents of its Bankruptcy jurisdiction. Similarly, the Federal Power Commission by the Natural Gas Act was given jurisdiction to regulate the transportation and sale of natural gas in interstate commerce for resale. This case involves no exercise of the expertise by the Federal Power Commission or review thereof by the Federal courts as was decided by this Court when this case was previously before it. Therefore, this issue of State law can await State court determination without in any respect abrogating the supervisory powers of Federal courts in determining that the Federal Power Commission is properly carrying out its function.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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Opinion of U. S. Court of Appeals, Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,568

SHELL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS & ELECTRIC COMPANY,

Intervenor-Respondents.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL POWER COMMISSION.

Argued April 18, 1961

Before: GOODRICH, McLAUGHLIN and STALEY, *Circuit Judges.*

Opinion of the Court.

(Filed June 15, 1961)

By McLAUGHLIN, *Circuit Judge.*

The Supreme Court upheld our jurisdiction to determine the question of the proper interpretation to be given the "favored nation" clause of the 1951 contract between petitioner and Texas Gas in dispute here. It disagreed with our construction of the agreement, holding that the clause does not effect an increase in price by reason of the February 17, 1954 Texas Gas agreement with Atlantic.[1]

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[1] *Texas Gas Corp.* v. *Shell Oil Co.*, 363 U. S. 263 (1960).

The case was therefore reversed and remanded to us for decision first, whether the enforceability issue is material and second, if it is, to pass upon its merits.

The answer to our first inquiry is simply arrived at. We had assumed without deciding that the basic 1943 contract between Atlantic and the predecessor of Texas Gas was enforceable and held that the 1954 agreement was a separate contract.[2] The Supreme Court, necessarily under the same assumption, viewed the 1954 transaction as merely a price adjustment within the 1943 agreement. If a price agreement for the third 1943 contract period was not enforceable under that contract when the second one expired on August 31, 1953, the February 1954 agreement between Atlantic and Texas Gas brought into play the Shell-Texas Gas raise in price clause. Such conclusion would of course not be in conflict with the referred to opinion of the Supreme Court. It follows that the question of whether the 1943 contract was enforceable with respect to the 1954 price agreement, is most material.[3]

Petitioner contends that the 1943 contract between Atlantic Refinery Co. and Louisiana, as successor to Defense Plant Corporation, was severable and by itself, not controlling beyond its first five year period. For that time the agreed price for gas received by the buyer was 2.2¢ per Mcf. The below quoted language from Paragraph 3 dealt with the prices for the balance of the twenty-five year contract:

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[2] *Shell Oil Co.* v. *Federal Power Commission*, 263 F. 2d 223 (1959).

[3] It is argued that the issue is not material because Atlantic and Texas Gas treated the 1943 contract as binding and that it is not for Shell, a stranger to the contract, to say it was not legally enforceable. Shell's position is that the 1954 agreement between Texas Gas and Atlantic is the type contract specifically noted in its 1951 agreement with Texas Gas which would activate the escalator clause of that obligation. Its contention forces examination of the 1943 document. Should that examination reveal that the agreement does not legally control the determination of the price of the contract gas for the third five year period, Shell receives the strongest possible support in its construction of the 1954 contract.

"(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

"(c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

"(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII."

The pertinent arbitration provisions of Condition XII read:

"XII. * * * The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrators shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.

> "* * * The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same. * * *"

For our purposes the facts regarding the 1943 contract can be briefly stated. As to the gas price for the second five year period, the parties, in October 1948, first agreed to a price covering the six months from September 1, 1948 to March 1, 1949, providing that at the end of that time they "* * * will negotiate, in accordance with paragraph III b and d, the price to be paid for gas delivered during the remaining four years and six months of the second five year period as provided in the contract." On February 16, 1949, the parties by written contract stated "* * * it is desired by the parties hereto that a new agreement be reached as to the price to be effective during the remainder of the second five year period of the contract." And further said "* * * that for the period beginning March 1, 1949 and ending August 31, 1953, the price of gas shall be five cents (5¢) net per one thousand (1,000) cubic feet of gas received * * *."

With the beginning of the third five years at hand Texas wrote Atlantic saying that "* * * The price provisions * * * expire on August 31, 1953" and "* * * You are hereby notified of our willingness to commence negotiations with you concerning such price * * *." Those negotiations commenced the following month and were concluded by a contract entered into on February 17, 1954. This fixed the gas price of 12.2¢ per Mcf as of September 1, 1953 and extending to August 31, 1958. It is this agreement that petitioner urges triggered the escalation clause of its contract with Texas Gas. At that time petitioner was receiving 8.997¢ per Mcf.

The Presiding Examiner agreed with Shell. Deciding we had jurisdiction to construe Shell's contract, we held that its "favored nation" provision was activated by the February 17, 1954 agreement between Atlantic and Texas Gas. As stated, we assumed without deciding that the

Atlantic-Louisiana 1943 commitment imposed "a binding agreement to agree on the price of gas in each of the contract's last four five year periods." Certiorari was granted on the question of jurisdiction. That point was upheld but the Supreme Court as to the construction of the 1943 agreement (which question was within the scope of the petition for certiorari) concluded that the 1954 Atlantic-Texas Gas contract did not bring into being the escalator provision of the Shell-Texas Gas covenant.

Our primary responsibility on remand is to determine whether with respect to its third five year term, the 1943 contract between Atlantic and Texas Gas was enforceable. The answer to this lies in the pact's arbitration clause. Under that the certainty of arbitration is properly conceded by Shell. Its concession however goes no further. And it argues determinedly and forcefully that the arbitration might never have resulted in an accepted price. If this is so Shell's contention is correct.

We are dealing with a full dress instrument. Its twenty five year continuity is clearly expressed. Its intent to have binding prices for the indicated gas throughout its term is evident. It could have been and should have been tighter in that regard but we do not consider it so loose as to defeat the mandatory establishment of prices under it for all its segments. Purpose of the parties alone is not enough but starting with that, as we must, the 1943 instrument, correctly interpreted, will produce a fixed price for its 1953-1958 portion.

The problem in the first instance is not one of specific performance. No need worrying about that if no price certain is ascertainable. Assuming no price accord between the parties on the period before us either one of them under Condition XII by notice to the other can name an arbitrator. The second party within ten days after that is empowered to select a second arbitrator. Within a second ten days, a third arbitrator, chosen by the first two is provided for. If either party fails to designate an arbitrator, the one chosen "shall arbitrate the question alone." If two arbitrators have been appointed and they do not

agree on a third, the latter "* * * shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application by either of said parties to the arbitration." Condition XII concludes by stating "* * * The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same * * *."

It seems to us that the above language is meaningful. By it the parties accept a definite standard under which the gas price will be established directly within the contract area. The intent is plainly that if arbitration be necessary to arrive at a price the prescribed method will produce the contemplated price. And the mechanics of the stated procedure follow through acceptably to that end. We cannot say that, given the elaborate structure and purpose of this long term agreement, Condition XII can be fairly construed to be so maladroit that its language justifies a reasonable view that the arbitration established by it will so misfunction as to be unable or unwilling to arrive at a price.[4]

Nor can we agree that the flexible pricing arrangement of the contract makes it severable to the degree that it does not come into effect with respect to the periods beyond the first until the actual price for each has been determined. The motivation behind the periodic price adjustments is recognition of the probabilities of normal price variation in gas during the long duration of the contract. The principle makes sense against any contrary view that might be urged. Particularly is it desirable as compared to an attempt to state rigid price figures for the whole future twenty five year operation. It is true that

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[4] We find no substance to the proposition that because the parties, at the conclusion of the second five year period, directly negotiated between themselves the gas price figure for the third year it would have been too late under the contract for them to have then turned to arbitration. It seems to us that negotiations, even if protracted, are plainly the contract intendment. The arbitration machinery is set up for use should such negotiations prove unsuccessful.

certain standards for the calculation of the interval prices could have been and might well have been named. Absent these there is present the definite procedure and obligation to accede to it by which the needed prices are to be fixed.

Much is said in the case on the question of whether Louisiana law governs enforceability of the contract but under our conception of the controverted document, Louisiana law, in this instance at least, does not differ from general contract doctrine. Therefore, abstract discussion of whether Louisiana law controls the enforceability of the Atlantic pact is not called for. Circumstances considered, the Atlantic-Texas Gas agreement does contain a valid, workable price-fixing standard. We would be ignoring this and descend to quibbling were we to hold otherwise.

The order of the Commission will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,568

SHELL OIL COMPANY,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent.

TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLIE GAS AND ELECTRIC COMPANY,

Intervenors.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL POWER COMMISSION.

Present: GOODRICH, MCLAUGHLIN and STALEY, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the Federal Power Commission be, and it is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

June 15, 1961.

Office-Supreme Court, U.S.
FILED
Oct 11 1961
JAMES R. BROWNING, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 399.

SHELL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION, TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS & ELECTRIC COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF TEXAS GAS TRANSMISSION CORPORATION AND LOUISVILLE GAS & ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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October 11, 1961

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 399.

SHELL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION, TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS & ELECTRIC COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF TEXAS GAS TRANSMISSION CORPORATION AND LOUISVILLE GAS & ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Court of Appeals (Appendix A to the Petition) is reported at 292 F. 2d 149. The opinion of this Court reversing a previous decision in favor of Petitioner by the Court of Appeals, and remanding, is reported at 363 U. S. 263*. The order of the Federal Power Com-

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* The previous opinion of the Court of Appeals is reported at 263 F. 2d 223.

mission ("Commission") (R. 2116-25)* appears at 18 F. P. C. 617, 22 P. U. R. 3d 94; its denial of rehearing (R. 2149-54) is reported at 19 F. P. C. 74, 22 P. U. R. 3d 101.

Jurisdiction.

Jurisdiction is invoked by Petitioner under 28 U. S. C. § 1254(1) and § 19(b) of the Natural Gas Act, 15 U. S. C. § 717r(b).

Questions Presented.

Petitioner's version of the "Questions Presented" is based—and depends—on a misstatement of the decision of the Court of Appeals. The Court of Appeals did not, as Petitioner would have this Court believe, resolve the issue before it "on the basis of federal substantive law (which it characterized as 'general contract doctrine', *infra*, p. A-7) rather than on the basis of the law of Louisiana" (Petition, p. 2). What the Court of Appeals did do was to hold that *both* under Louisiana law and under general contract doctrine (which it did *not* confine to, or identify as, "federal substantive law") a 1943 long-term gas purchase contract contained an enforceable method for deter-

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* Record references (other than to the opinion of the Court of Appeals printed as Appendix A to the Petition) are to the pages of the original record before the Commission. Those page numbers are prominently shown in the Joint Appendix in the court below filed with the Petition. Citations to an "Item" refer to certain documents filed with the Commission introduced in evidence through incorporation by reference. "Ex." is used to designate exhibits physically put into evidence. Record references are limited to the place in the record where the document or its pertinent provision appears. Generally, the portions of the record which were printed do not include the transcript page at which the document was offered in evidence.

mining price thereunder for the five-year period from 1953 to 1958.*

The questions presented are:

1. Did the court below err in holding that under Louisiana law (which Petitioner claims is applicable) the 1943 gas purchase contract contained an enforceable method for determining price for the five-year period from 1953 to 1958?

2. If—and only if—the court below erred in holding that the contract contained an enforceable method for determining price under Louisiana law, was Louisiana law applicable or was either the law of another jurisdiction or federal law applicable to the question of enforceability (Petitioner claiming only that the contract was unenforceable under Louisiana law)?

3. Assuming Louisiana law governs, should federal court action be held in abeyance to await a decision (if there ever is one) in an action filed by Petitioner in July 1961 (after the decision below by the Court of Appeals against Petitioner) in the Civil District Court for the Parish of Orleans, State of Louisiana, which action Petitioner states involves the same issue of enforceability decided by the Court of Appeals?**

Statement of the Case.

In its "Statement", as in its "Questions Presented", Petitioner, Shell Oil Company ("Shell"), seeks to create an

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* The Court of Appeals did not—as Petitioner intimates—base its opinion on, nor did it even mention, the fact that the 1943 contract was filed with the Federal Power Commission as a "rate schedule" (Petition, pp. 2, 9-11).

** A fourth question, to which Respondents would address themselves in the event certiorari were granted but believe unnecessary to argue in this brief, is: Even if the 1943 contract were unenforceable, is this material to the case?

issue where there is none—by obfuscation of the decision of the Court of Appeals and of the narrow questions decided by that court. Understandably, Shell has also failed to state what the Supreme Court has already decided in this case—which is the only way of determining what is no longer open to argument. A restatement of the case is therefore necessary.

The ultimate issue in this case is the rate payable under a 1951 contract ("Shell contract") (Item A, R. 227-46) for the sale of gas by Shell, an independent producer of gas, to Texas Gas Transmission Corporation ("Texas Gas")*, an interstate gas pipeline company, which contract was filed with the Commission by Shell as a gas rate schedule as required by the Commission's regulations issued pursuant to the decision of this Court in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672. Shell's contention is that under a favored-nation clause in the Shell contract there was an automatic increase in the stated contract price when price was redetermined in 1954 between Texas Gas and another supplier, The Atlantic Refining Company ("Atlantic"). The order of the Commission, attacked by Shell, determined that the effective rate under the Shell contract was the stated contract price and that a price increase had not been triggered under the favored-nation provision in that contract (R. 2116 *et seq.*).**

The Contracts.

The favored-nation provision in the Shell contract, which was executed in 1951, reads, in pertinent part, as follows:

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* The original party to the Shell contract was a subsidiary of Texas Gas, Louisiana Natural Gas Corporation, which was later merged into Texas Gas. "Texas Gas" will be used throughout this brief to refer to both the parent and subsidiary.

** Texas Gas intervened in these proceedings as the purchaser under the rate schedule and Louisville Gas & Electric Company ("Louisville"), a consumer of Texas Gas, intervened because a decision in favor of Shell would have an adverse effect upon the public served by Louisville.

> "If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller of such fact, and if the price per one thousand (1000) cubic feet at any time payable under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract" (Item A, R. 239-40).

When Texas Gas entered into the Shell contract, it was a party to a gas purchase contract ("Atlantic contract") with Atlantic (Item E, R. 267-79) which had been entered into in 1943 by Defense Plant Corporation, an instrumentality of the United States Government, Texas Gas' assignor.* The Atlantic contract provides for a fixed price during the first five-year period under the contract and, for the remaining four five-year periods, it stipulates that:

> "(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

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* Texas Gas purchased the pipeline operated by the Government corporation and on May 11, 1949 became the assignee of the Government's rights and obligations under the Atlantic contract (Item H, R. 287).

"(c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

"(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII" (Item E, R. 271).

Condition XII provides as follows for redetermination of price by arbitration in the event that the parties are unable to redetermine price for any five-year period pursuant to the foregoing provisions:

". . . such question or dispute shall be referred for settlement to three arbitrators, one appointed by Seller, one appointed by Buyer, and the third appointed by the two others so chosen. The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrator[s] shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.

> "The matter in question or dispute shall be submitted in writing to the arbitrators immediately upon the completion of their appointment, and the parties shall do all things necessary to make proper submission thereof according to the character of the question or dispute involved, or as required by the arbitrators. The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same." (R. 276-77)

Pursuant to the price redetermination provisions in the Atlantic contract, Texas Gas and Atlantic redetermined the price for the five-year period beginning September 1, 1953 without need of arbitration (Exs. 5-7, R. 124-29). This price was recorded in a brief letter agreement dated February 17, 1954 which specifically stated that such price redetermination was in accordance with the 1943 contract (Ex. 9, R. 132).*

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* The entire text of this letter agreement for the redetermination of price was as follows:

> "Under date of September 1, 1943, Defense Plant Corporation, as Buyer, entered into a gas purchase contract with The Atlantic Refining Company, as Seller, for the purchase of gas produced from Seller's leases in the North Tepetate pool of Acadia Parish, Louisiana, which contract was subsequently amended February 16, 1949. Louisiana Natural Gas Corporation purchased the pipeline operated by Defense Plant Corporation and the aforesaid contract with The Atlantic Refining Company was assigned to Louisiana Natural Gas Corporation.
>
> "In accordance with Paragraph III of said contract, it is hereby agreed that the price to be paid by Louisiana Natural Gas Corporation to The Atlantic Refining Company for gas sold and delivered under such contract between September 1, 1953 and August 31, 1958, both inclusive, shall be 12.2 cents net for each 1,000 cubic feet at a pressure base of 15.025 psia of gas received at the central point or points set forth in the original contract, regardless of whether such gas is delivered to a government plant or not; and, in addition, Buyer shall reimburse Seller for all State severance taxes, or similar taxes, which Seller is obligated to pay and has paid to the State of Louisiana on such gas."

The Decision of the Supreme Court.

The order of the Commission (R. 2116 *et seq.*), determining that the effective rate under the Shell contract was the stated contract price and that no price increase had been triggered under the favored-nation clause, was reversed by the Court of Appeals. 263 F. 2d 223. This Court granted certiorari (361 U. S. 811), unanimously reversed the decision of the Court of Appeals and remanded. 363 U. S. 263.

This Court, in rejecting Shell's arguments, stated *inter alia*:

> "The question to be decided is: did the parties to the Shell contract mean that an agreement of the nature of the Atlantic letter agreement of February 17, 1954, should constitute the 'enter[ing] into a contract [by Texas Gas] providing for the purchase by it of gas . . .'? We first consider the nature of the letter agreement. The pricing provisions of the Atlantic contract specify a price for the first five-year period, and provide that prices for the four succeeding five-year periods should be determined by agreement of the parties, or failing such agreement, by arbitration.[8] In either case the determination is to be made 'after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.'
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>
> "[8] For purposes of its decision the Court of Appeals 'assumed without deciding that the Atlantic contract of 1943 did in fact impose a binding agreement-to-agree on the price for gas in each of the contract's last four five-year periods.' 263 F. 2d at 226. We proceed on the same assumption in reviewing the interpretation of the 'favored nation' clause in the Shell contract.
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> • • • • • •
>
> "Shell urges that the letter agreement is in actuality an entirely new contract which incorporates by inferential reference the terms of the 1943 contract. There is nothing in the letter agreement or otherwise in the record to substantiate this con-

tention. On the contrary, the letter agreement affirmatively states that the action was taken 'in accordance with' the 1943 contract.[9]

"[9] [The Supreme Court's footnote omitted.]

• • • • • •

". . . 'enter[ing] into a contract providing for the purchase of gas' meant to the parties the making of a full-fledged contract containing all the terms defining the complete relationship.

"• • • In deciding which increases do and which do not trigger this 'favored nation' clause we would be making an irrational distinction were we to focus upon the mechanics chosen in the Atlantic contract and conclude that the Shell clause was activated by a post-1951 price determination under the Atlantic contract, although it would not have been activated by price increases pursuant to a more mathematically precise formula. In its essential respects the Atlantic price adjustment was no different from the latter, for the Atlantic adjustment was required under a pre-existing contract, and Texas Gas was powerless to prevent it.

"We therefore hold that the Court of Appeals erred in its interpretation of the 'favored nation' clause and that the Commission correctly construed it as not effecting an increase in price by reason of the letter agreement." (363 U. S. at 270-76).

This Court remanded to the Court of Appeals solely to give that court an opportunity to consider one of Shell's arguments which the Court of Appeals had stated in its opinion it found unnecessary to consider because of the rationale which it adopted. This was the argument "that when the second five-year period [under the Atlantic contract] came to an end on August 31, 1953, neither Atlantic

nor Texas Gas was under *any** enforceable obligation to continue the prior relationship and therefore when on February 17, 1954, Texas Gas signed the letter agreement it was not acting pursuant to *any* pre-existing obligation" (363 U. S. at 276). This Court stated, however, that the Court of Appeals should address itself to this argument only if it first found the argument to be material to the case.**

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* Wherever italicization appears in a quotation in this brief, it has been added.

** The following is the full opinion of this Court [with footnotes omitted] respecting the remand:

> "There remains for mention an argument of Shell which the Court of Appeals found unnecessary to consider because of the rationale which it adopted. This is the contention that the 1943 Atlantic agreement did not provide for a fixed and determined price beyond the first five-year period, so that under applicable state law enforceability was suspended until the contract price for a particular succeeding five-year term was supplied by agreement or arbitration. From this premise it is argued that when the second five-year period came to an end on August 31, 1953, neither Atlantic nor Texas Gas was under any enforceable obligation to continue the prior relationship and therefore when on February 17, 1954, Texas Gas signed the letter agreement it was not acting pursuant to any pre-existing obligation but was exercising its free choice to enter what was in effect a new contract. In its petition for writ of certiorari the Commission argued that not only was there no doubt about the enforceability of the Atlantic contract but that the issue is immaterial because the parties to that contract treated the contract as binding and that it is not for Shell, a stranger to the contract, to say that it was not legally enforceable. However, the Commission suggested that should we reverse the decision of the Court of Appeals, premised as it is upon the assumption that the 1943 Atlantic contract imposed a binding obligation for its entire stated term, and if we considered the question of enforceability to be material, we should remand the issue of enforceability to the Court of Appeals for its decision. Shell has maintained in this Court that the issue of enforceability is material but, in view of the Commission's statement, has argued neither that issue nor the issue of enforceability. We agree that it is appropriate that the Court of Appeals address itself to the enforceability issue, if it is material, but under the circumstances we think the Court of Appeals should first decide

The Decision of the Court of Appeals.

Acting under the terms of the remand by the Supreme Court, the Court of Appeals decided, first, that the enforceability issue was material (Petition, p. A-2). The Court of Appeals then held that the Atlantic contract was enforceable—*under contract law generally and under Louisiana law specifically.* It found that the contract "does contain a valid, workable price-fixing standard" and "the definite procedure and obligation to accede to it by which the needed prices are to be fixed" (Petition, p. A-7). In view of this holding, the court decided that it was unnecessary to indulge in an "abstract discussion" of conflicts of law. The court stated:

> "Much is said in the case on the question of whether Louisiana law governs enforceability of the contract but under our conception of the controverted document, Louisiana law, in this instance at least, does not differ from general contract doctrine. Therefore, abstract discussion of whether Louisiana law controls the enforceability of the Atlantic pact is not called for. Circumstances considered, *the Atlantic-Texas Gas agreement does contain a valid, workable price-fixing standard. We would be ignoring this and descend to quibbling were we to hold otherwise.*" (Petition, p. A-7).

In reaching its conclusion, the Court of Appeals pointed out that the 25-year continuity of the 1943 Atlantic contract, "a full dress instrument", is clearly expressed.

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the question of materiality. We therefore reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion." (363 U. S. at 276-77)

The contract's "intent to have binding prices for the indicated gas throughout its term is evident." (Petition, p. A-5).

The Court of Appeals then turned to the arbitration clause in the Atlantic contract as the mechanism by which the contract is made enforceable for the second and subsequent five-year periods thereunder. The court stated that the intent of the parties was "plainly that if arbitration be necessary to arrive at a price the prescribed method will produce the contemplated price. And the mechanics of the stated procedure follow through acceptably to that end." (Petition p. A-6).

The court below noted, first, "*that the certainty of arbitration is properly conceded by Shell*" (Petition, p. A-5). There being no question as to the enforceability of the arbitration clause, the court next described the arbitration procedures established by that clause—procedures which make it impossible for any one party to prevent or defeat arbitration (Petition, pp. A-5, A-6). Finally, the court noted that the decision of the arbitrators is expressly made "final and conclusive" and binding upon the parties (Petition, p. A-6). In accordance with the intent of the parties to the contract, "there is present the definite procedure and obligation to accede to it by which the needed prices are to be fixed" (Petition, p. A-7).

ARGUMENT.

I.

Because this case presents no question of general importance, Petitioner misstates the decision below and asks this Court to pass upon a specious issue.

When this case was previously before this Court, there was presented by the Commission, Texas Gas and Louisville an important question of the scope of review of federal administrative determinations. This Court, while determining that the scope of review question need not be reached because the Commission had decided the case on principles of general contract law, nevertheless made it clear that the motivating force for granting certiorari was the administrative law question and not the contract law questions.* In its present posture, not only does this case not present any question of administrative law or other question of general importance, but the case is presented after a remand by this Court on the very narrow question of the enforceability of a subsidiary contract. Considering the purely commercial nature of this private dispute between Shell and Texas Gas** and considering the fact as

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*The Court stated: "We granted the separate petitions for certiorari . . . being particularly moved to do so by the contention made in both petitions that the Court of Appeals exceeded the appropriate scope of judicial review of the Commission's determination." 363 U. S. at 268.

**Despite the fact that an administrative law question involving administrative expertise was presented to this Court in the prior petitions in this case, it was Shell's position in opposing the grant of certiorari that:

> ". . . [T]his is not a case of general importance but, in reality, is nothing more than a contract dispute between Shell and Texas Gas involving a privately negotiated contract in a unique situation which has already been to the

[continued on next page]

quoted by the court below that "the certainty of arbitration is properly conceded by Shell" (Petition, p. A-5), it is apparent that there is no question presented here which merits the attention of this Court.

In mute recognition that the decision below raises no issue which merits the attention of this Court, Shell has sought to fabricate an issue by misstating the opinion below—and now urges this fabricated issue as its main argument for the grant of certiorari.

Shell states:

> "The decision below stands as authority for the proposition that federal substantive law, or some nebulous general common law, rather than the law of the State of performance, governs the enforceability of a contract on file with the Commission as a rate schedule. This precise issue—although of far-reaching importance—has not been, but should be, resolved by this Court." (Petition, p. 11).

In fact, the decision below stands for no such authority and raises no such issue. The court below held that under Louisiana law specifically and under contract law generally the 1943 Atlantic contract contained an enforceable method for determining price for the five-year period from 1953 to 1958 (see pp. 11-12, *supra*). The court below never mentioned federal substantive law. Indeed, the court below never mentioned—because it was irrelevant to its opinion—that the Atlantic contract was on file with the Commission as a rate schedule.

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decisional level three times and in which Texas Gas, with the aid of the Commission, is merely seeking another decision more to its liking." (Brief in Opposition, Nos. 167 and 170, October Term 1959, pp. 17-18).

Since no administrative law question is now involved, these words are truly applicable to Shell's present petition.

Significantly, the only contentions which Petitioner (and *not* the Court of Appeals) cites—and attempts to refute—for the applicability of federal law have nothing to do with the fact that the Atlantic contract was filed with the Commission as a rate schedule, but relate, instead, to the particular terms and circumstances of that contract: (1) the contention that the Federal Arbitration Act is applicable to the enforceability of the arbitration clause and (2) the contention that federal law is applicable because the original party to the Atlantic contract was a federal agency which assigned its rights under the contract to Texas Gas (Petition, pp. 10-11, fns. 6, 7). See pp. 26-28, *infra*.

Respondents have always contended that regardless of what law governed—whether Louisiana law, whether the law of some other state, or whether federal law—the Atlantic contract was unquestionably binding as to the five-year period starting in 1953—particularly in light of the conceded enforceability of the arbitration clause. This is also the clear holding of the Court of Appeals.

II.

Assuming Louisiana law governs, the court below correctly applied that law to the issue of enforceability.

Shell, in its futile attempt to find some conflict between Louisiana law and the decision below, persists in arguing issues which are not germane to the decision below or to the issue remanded by this Court. The issue is not whether the Atlantic contract was effective as a "sale" under Louisiana law (Petition, pp. 13-21). The only issue (other than materiality) before the Court of Appeals was whether

Texas Gas or Atlantic was under "any enforceable obligation to continue the prior relationship" at the end of the second five-year term or whether Texas Gas was "acting pursuant to *any* pre-existing obligation" in redetermining price under the Atlantic contract. 363 U. S. at 276. If the 1943 Atlantic contract contained an enforceable price-fixing mechanism applicable to the 1953-1958 period, Shell must lose. Every other issue in the case has already been decided adversely to Shell by the opinion of this Court.

The existence of an "enforceable obligation to continue the prior relationship" of the parties at the end of the second five-year period of the Atlantic contract is readily demonstrated by Shell's concession as to the enforceability of the arbitration clause and by those parts of Shell's own Louisiana authorities which it persists in ignoring.

Shell does not dispute the enforceability of the Atlantic arbitration clause under Louisiana or any other law; indeed, it has conceded it (Petition, p. A-5). See La. Civil Code, Art. 2465. With this concession of enforceability, given the nature of the arbitration clause and its context, there is nothing left for Shell to argue under the law of any jurisdiction. Shell's only answer to this is the following *non-sequitur:*

> "Neither a purported sale nor a purported contract to sell is enforceable or of any legal effect [under Louisiana law] until the price is fixed, *and that is true even though the contract contains an enforceable arbitration clause.*" (Petition, p. 13)

What Shell chooses to ignore, among other things, is that when it grants—as it must—the enforceability of the arbitration clause, it concedes what is here at issue: an enforceable method of fixing price under the 1943 Atlantic contract and an "enforceable obligation [of the parties] to continue

the prior relationship" (363 U. S. at 276) at the expiration of the contract's second five-year term.

This is made doubly clear both by the pricing provisions of the Atlantic contract in general and by the specific provisions of the arbitration clause in particular. The arbitration clause is one of the many provisions of the 1943 Atlantic contract designed to the common end of providing for continuity of supply of gas over the life of the entire contract. In carrying out the objective of ensuring a firm long-term commitment to sell and purchase gas, the price provisions in the Atlantic contract make it dead certain that neither party has the right or power to prevent the price from being determined.

After the first five years, the contract specifically provides a mechanism to insure that price will be determined, the terms of which are mandatory and not optional. The contract first states that "Buyer agrees to pay *for the gas received hereunder a price computed as follows:*"— and then goes on to provide in mandatory terms that for the second five-year period the parties "*are* to reach an agreement as to the price for gas sold and delivered *under this contract*", and that "The price • • • *is to be* agreed upon at the beginning of such period *after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.*" For succeeding five-year periods, "prices to be paid *will be determined* at the beginning of each period in the same manner" (Item E, R. 270-71).

The pricing provisions of the 1943 Atlantic contract do not stop at the requirement that the parties "are to reach agreement". To forestall any possibility of an impasse at that point, the Atlantic contract goes on to impose a bilateral obligation requiring that, if the parties are unable to agree, "*such determination shall be submitted to arbitra-*

tion'' in accordance with the well-drawn and self-operating arbitration provision (Item E, R. 271, 276-77).

Under the arbitration procedure, each party is to appoint an arbitrator. If either party fails to do so within a specified time, the arbitrator appointed by the other party *''shall arbitrate the question alone''*. The two arbitrators selected by the parties *''shall''* appoint a third arbitrator. If they fail to do so within a specified time, the third arbitrator ''shall be appointed'' by the senior Judge of the Fifth Circuit upon application of either party. Neither party, by act or omission to act, can halt or frustrate the arbitration proceeding. (Item E, R. 276.)

The intention to be bound by the arbitration machinery is also reflected in the following provisions:

> ''The matter in question or dispute *shall be* submitted in writing to the arbitrators immediately upon the completion of their appointment, and the parties *shall do all things necessary to make proper submission thereof* according to the character of the question or dispute involved, *or as required by the arbitrators.* The decision in writing signed by a majority of the arbitrators *shall be final and conclusive* with respect to the matter submitted *and the parties hereto agree to accept and abide* by the same'' (Item E, R. 276-77).

Furthermore, the Atlantic contract supplies a method of insuring continuity even when the price may be in dispute—such as during the period while the price-fixing mechanism is in operation. It provides that ''Buyer shall not be considered to be in default hereunder if, in case of a bona fide dispute with respect to any portion of its bill, payment of the portion thereof not in dispute is made'' (Item E, R. 275).

All this is ignored by Shell. Instead, Shell resorts to an exercise in obfuscation as to Louisiana law—none of which has anything to do with the fact that the concededly enforceable arbitration clause demands an affirmative answer to the question on which the Court of Appeals was passing: Was Atlantic or Texas Gas under "*any* enforceable obligation to continue the prior relationship" at the end of the second five-year period under the contract?

For the most part, Shell argues the irrelevant question whether under Louisiana law the 1943 Atlantic contract was effective as a "sale" (or "contract of sale", which means "sale" under Louisiana law) prior to the fixing of price or whether under a "contract to sell" the remedy of specific performance is available prior to the fixing of price or the meeting of some other condition (Petition, pp. 13-21). It is with this that the quoted passages of Shell's statutory and other authorities deal—not with the question of the enforceability of the price-fixing mechanism in the 1943 Atlantic contract.

The very authorities on which Shell itself relies—in passages which Shell fails to quote—demonstrate that under Louisiana law the Atlantic arbitration provisions would be held to be fully binding and that, therefore, the 1943 Atlantic contract to sell would continue to be binding. The law review article on which Shell places the greatest weight, Hebert and Lazarus, *Some Problems Regarding Price in the Louisiana Law of Sales*, 4 La. L. Rev. 378 (1942), expressly makes this clear. In a part of that article which Shell never refers to it is stated:

> "It is true that one of the parties may refuse to comply with his obligation of appointing the estimator and thus has it within his power to nullify the agreement; but the contract is nonetheless binding, *even though it cannot be effective as a sale*

> until and unless the parties have named the arbitrators and they have fixed the price. That the contract is ineffective if the parties only agree to designate the experts afterwards, is true only to the extent that there is no sale. *However, the contract is binding upon the parties to the extent that should either one refuse to comply with his obligation to appoint the appraiser, which is an obligation to do, he will subject himself to damages for the breach thereof.*
>
> "The rule announced in the *Werner* case should therefore be qualified by the foregoing. What was evidently intended was that the sale was unenforceable as such, *but that the obligation to name the experts was nevertheless binding*" (4 La. L. Rev. at 400-01; see also pp. 380, 385, 387, 412, 418).*

Of course, the rule referred to in this law review article would apply *a fortiori* to the self-executing terms contained in the Atlantic arbitration provision, under which the parties specifically eliminated any need to seek judicial assistance or vindication in the process of appointing the arbitrators. This is shown in the case of *Lake* v. *LeJeune*, 226 La. 48, 74 So. 2d 899 (1954), which is cited by Shell (Petition, p. 21). In the *Lake* case, the court clearly stated that the touchstone for judicial enforcement of a provision for the appointment of appraisers was whether or not "any one of the [parties] has the power to refuse to appoint." See 74 So. 2d at 901-02.** Since the Atlantic arbitration

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* To the same effect: Comment, *Certainty of Promise in the Law of Sale*, 30 Tul. L. Rev. 568, 569-70 (1956); Smith, *Civil Code and Related Subjects (Particular Contracts)*, 16 La. L. Rev. 242, 243 (1956).

** The *Lake* case involved an action for specific enforcement where the plaintiff was seeking to obtain title to real property. For the reasons stated above, the Atlantic contract would be specifically enforced to the extent necessary. Moreover, even when Louisiana courts would not decree that particular remedy, they

provision specifically prevents either party from having "the power to refuse to appoint", that provision meets the requirements of the *Lake* case.*

There is nothing mysterious or peculiar to the law of Louisiana about this test or this result. In Louisiana, as elsewhere, the Atlantic arbitration machinery is enforceable because its self-executing provisions effectively remove fixing of price from the whim, caprice or control of the parties. See Hebert and Lazarus, *supra,* 4 La. L. Rev. at 410, 412, 418. However, Shell's argument essentially is that a price arbitration provision must be immune from every possibility of frustration, even though beyond the control of the parties (Petition, pp. 15-16). This extreme contention is wholly at war with the classic and universal test that a promise is obligatory when, as Hebert and Lazarus recognize, it is independent of the whim or caprice of the parties.

It is, of course, true that if *neither* party appointed an arbitrator, there would be no arbitration (Petition, pp. 15-16). But this is no different from stating that both parties to a contract may, by agreement, abrogate or terminate its provisions. Until the contract is terminated or abrogated by agreement of both parties, however, the contract continues as a valid and binding instrument.

Shell, though not disputing that at least the arbitration clause in the Atlantic contract is enforceable, raises the

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will enforce agreements to arbitrate by way of damages. See Smith, *Civil Code and Related Subjects (Particular Contracts),* 16 La. L. Rev. 242 (1956); see also the passage quoted at pp. 19-20, *supra,* from the Hebert and Lazarus article.

* Shell wholly misstates the *Lake* case as involving a provision whereby "either party alone could designate the appraisers" (Petition, p. 21). It is crystal-clear that that case did not involve a provision where each party had the separate and independent right to name the sole arbitrator in the event that the other party refused to name one. Otherwise, the court would not have said that "any one of the [parties] has the power to refuse to appoint."

entirely false issue, by confusing sales and contracts to sell, of whether there is still something wrong with the contract under Louisiana law. Its whole premise is that, if there is a "suspensive" condition to the sale, the Louisiana courts somehow would not enforce any part of the 1943 Atlantic contract—even though they would enforce the price-fixing mechanism (Petition, pp. 13, 15, 18, 20-21, A-5). Apart from the fact that this is obviously a contradiction, Shell misses the whole point that, even though there may be a "condition" of some kind to the sale of gas under the Atlantic contract for subsequent five-year periods,* the condition itself in this case is fully obligatory (which indeed Shell admits when it concedes that arbitration is enforceable) and therefore does not affect the obligatory nature of the contract to sell. See Comment, *Certainty of Promise in the Law of Sale*, 30 Tul. L. Rev. 568, 569-70 (1956).

Shell's self-contradictory argument as to Louisiana law, based on the confusion of "sale" and "contract to sell", is not only irrelevant to the issue decided by the Court of Appeals; it is also expressly contradicted by the Louisiana authorities. It is contradicted not only by the already quoted passage from the Hebert and Lazarus article, upon which Shell relies so heavily,** but also, *inter alia*, by the

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* Actually, due to the nature of the 1943 Atlantic contract, sales would continue and title would pass even during arbitration or price renegotiation. Among other things, there is provision for interim payment of the amount not in dispute so as to ensure an uninterrupted flow of gas (Item E, R. 275).

** Oddly enough, Shell itself points out the difference between a "sale" and a contract or promise "to sell", and also notes that "contract *of* sale" is used in Louisiana to mean a "sale" (see Petition, pp. 13-14). Due to this usage, many references in the Louisiana cases to "contract" relate only to the "sale" and not to the "contract to sell". The whole piece of glue with which Shell seeks to put together its argument that "sale" and "contract to sell" may be used interchangeably is a footnote in the Hebert and Lazarus law review article, in which the authors state that a contract to sell in the future and a contract of a present sale are

following Louisiana authorities, including the *Barber Asphalt* case which is the principal decision cited by Shell (Petition, pp. 17-19):

> "If it was a sale, it would transfer the ownership; *because a sale is a transfer of ownership, and it is nothing else.* • • • When a sale is made under a suspensive condition, there is no sale until the condition has been fulfilled. There is merely *a contract that there shall be a sale* when the condition is fulfilled." *Barber Asphalt Paving Co.* v. *St. Louis Cypress Company,* 121 La. 142, 46 So. 193, 197 (1908).

> *"But the perfection of the contract so as to fix responsibility of the parties to it, in the event of its final execution or non-execution, is one thing, while the actual passing of the title of the thing, the object of the contract, under conditions suspensive in their nature, is another."* *Hamilton Co.* v. *Medical Arts Bldg. Co.,* 135 So. 94, 96-97 (La. App. 1931).

> "It may be that a contract by which property is acquired for a consideration to be paid in money may (technically considered) not be a sale as defined by the Code, *but it does not necessarily follow that such a contract is void because it cannot be classed as a sale."* *Union Tank Car Co.* v. *Louisiana Oil Refining Corp.,* 178 La. 940, 152 So. 571, 572 (1933).

See also Note, *Specific Performance—Sale and Contract to Sell Distinguished,* 4 La. L. Rev. 634, 636-37 (1942).•

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governed by the same rules (see Petition, p. 13, n. 9; see 4 La. L. Rev. at 381, n. 15). However, the article itself shows that the authors did not mean what Shell says, and contradicts the whole thesis of Shell's argument, because it makes the very distinction which Shell seeks to avoid. This is shown in the passages which Shell omits (see pp. 19-20, *supra*).

• The differences which Shell persistently ignores are made plain in an article of the Louisiana Code which Shell quotes (Petition, p. 14), Article 2462, which merely provides that a "promise to sell" so far amounts to a "sale" giving the right to "specific

[continued on next page]

III.

Shell's request that this case be held in abeyance pending a decision (if any) in an action in a Louisiana court commenced by Shell after the decision below is wholly without merit.

Finding no conflict between the decision of the court below and the decision of any Louisiana court, Shell urges this Court to hold the entire case in abeyance because, Shell claims, there is a chance of a Louisiana court in the future "possibly arriving at a contrary conclusion" (Petition, p. 22). In support of this strange argument, Shell states that, *after the adverse decision of the court below,* it commenced an action in the Civil District Court for the Parish of Orleans, State of Louisiana, wherein the issue here involved "will be among those" to which the state court will apply Louisiana law (Petition, pp. 21-22).

This argument is on its face so preposterous that we can scarcely believe that Shell advances it seriously. Shell cannot wish into being a conflicting Louisiana decision which does not exist. The bringing of an action in a Louisiana

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performance" when there is consent to the price. In any jurisdiction, the distinction between a sale and the contract to sell is most fundamental. See, e.g., 23 Halsbury, *Laws of England, Sale of Goods* §§12, 13 (3d ed. 1960), and the Note of the Commissioners on Uniform State Laws under §1 of the Uniform Sales Act. The obligatory nature of conditions is brought out in the articles of the Louisiana Code, specifying "casual", "mixed" and "potestative" conditions (Arts. 2022-25, 2034-35). A "suspensive" condition merely holds up transfer of title (Arts. 2471 and 2043). Even a "potestative" condition, which is in the control of one of the parties, is binding when there is a duty to fulfill it. See Art. 2035; *Stephen L. Guice & Co.* v. *Perkowski,* 12 So. 2d 692, 695 (La. App. 1943). Thus, conditions attach to performance or consequences and do not prevent a contract from being binding. See 3 Williston, *Contracts* §666 (rev. ed. 1936) ("What it is which conditions qualify").

court by Shell, after Shell lost in the court below, does not change this fact. Were this not so, every party, *after* litigating a case in the federal courts and *after* losing before the Court of Appeals on a question of state law, would be encouraged to commence an action in the state courts and then apply to this Court to stay federal court proceedings while the matter is relitigated in a state court.

While nothing more need be said on this point, it may be noted that not only is there no decision by the Louisiana court—there could, if this case were stayed, be no assurance that there would be a decision or as to the grounds for any decision. One thing, however, appears certain and that is that there would be no conflicting decision. Louisiana law is clear on the question here at issue—despite Shell's attempt to confuse that question and to make Louisiana law sound both complex and illogical (see pp. 15-23, *supra*).

Even in a case—unlike this one—where there is a real possibility of a serious conflict between state and federal courts and where the matter of state law is novel and difficult, the federal courts do not hesitate to reach a decision. This is made amply clear by the decision of this Court in *Propper* v. *Clark,* 337 U. S. 472, 489-92. After analyzing the whole problem of references to state courts, this Court stated that "in the absence of special circumstances", the submission of issues to a state court "is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy" (337 U. S. at 492).*

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* The case of *Thompson* v. *Magnolia,* 309 U. S. 478, cited by Shell (Petition, pp. 23-24), is wholly inapplicable. In the *Magnolia* case, unlike here there was a conflict between the Eighth Circuit and the Seventh Circuit as to the obviously difficult question of state law there involved (309 U. S. at 481, 484). In the *Magnolia* case, the bankruptcy court was directed to order the trustee in bankruptcy to file plenary proceedings to determine title in a state litigation necessarily complete in itself. There, unlike here, the

[continued on next page]

IV.

Even if the court below erred as to Louisiana law, Louisiana law is in any event not governing on the issue of enforceability.

Shell's attack on the decision below is based solely on some purported anomaly of Louisiana law. The Petition does not question the correctness of the decision under the law of any other jurisdiction or under contract doctrine generally.

As we have shown, Shell's contention that the court below misapplied Louisiana law is without merit. However, even if the court below erred as to Louisiana law, this is irrelevant. Shell's theory of why Louisiana law governs is in error, and this is an added reason, although none is needed, why its position is untenable.

Contrary to Shell's view, federal law would govern the matter of the enforceability of the Atlantic contract and its price-fixing provisions. On the specific question of whether the Atlantic arbitration provision would be enforceable and the manner of its enforcement, should there be any occasion prior to the arbitrators' decision to seek judicial assistance for its self-operating provisions, the Federal Arbitration Act would apply (9 U. S. C. §§1-14). That Act makes arbitration provisions fully "valid, irrevocable and enforceable" (9 U. S. C. §2). The Act expressly

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court through the trustee in bankruptcy had control of the issues to be raised in the state court proceeding. There, unlike here, the court could be sure there would be a decision by the state court on the very issue which it wished decided. There, unlike here, there was no possibility of a conflict with the state court on issues on which it was not intended to have the state court pass. Also, unlike the instant case which involves the price of gas in interstate commerce, the question referred in the *Magnolia* case related to a purely intrastate matter.

provides that it covers "any contract evidencing transactions involving commerce" (9 U. S. C. §2). See *Tenney Engineering, Inc.* v. *United Electrical Workers,* 207 F. 2d 450, 454 (3d Cir. 1953). The Atlantic contract is a contract evidencing a transaction involving "commerce" under the decision of this Court in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, and the arbitration clause is therefore governed by and fully enforceable under the Federal Arbitration Act. See *Kentucky River Mills* v. *Jackson,* 206 F. 2d 111, 117 (6th Cir. 1953), *cert. denied,* 336 U. S. 887.

Among other reasons why federal law and the Federal Arbitration Act would determine the obligations of the Atlantic contract is that the Defense Plant Corporation, an instrumentality of the Government, was originally a party to the contract. It is established doctrine that, when the United States Government is a party to a contract, the rights and duties of the parties are fixed by federal law. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363. See also *United States* v. *County of Allegheny,* 322 U. S. 174. When Texas Gas became a party to the Atlantic contract by assignment, it succeeded, as assignor, to the rights and duties of the Government under the contract and federal law continued to govern (Items E-H, R. 267, 280-83, 286-87). *American Houses* v. *Schneider,* 211 F. 2d 881, 882-83 (3d Cir. 1954). See also *Bank of America* v. *Parnell,* 352 U. S. 29, 34.

But even if we assumed, *arguendo,* both (1) that there was any merit to Shell's argument as to the result of applying Louisiana law and (2) that federal law is inapplicable, this would not help Shell. If federal law does not apply, the law of Louisiana still would not govern. In that event, the law of the District of Columbia would apply. That is the jurisdiction in which the Atlantic contract was

executed by the purchaser and thereby became binding, the contract having been earlier executed by the seller in Texas (Item E, R. 279). The authorities (including those of Louisiana) are generally in accord that the place of making of a contract controls the kind of question raised here, namely, whether an obligation is legally binding.* E. g., *Restatement, Conflict of Laws* §§ 332, 346 (1934); 2 Beale, *Conflict of Laws* §332.4 (1935); Goodrich, *Conflict of Laws* §§110, 154 (3d ed 1949); Goodrich, *Yielding Place to New: Rest Versus Motion in the Conflict of Laws,* 50 Colum. L. Rev. 881, 896-97 (1950); *Moore* v. *Burdine,* 174 So. 279, 281 (La. App. 1937); *Campbell Soup Co.* v. *Wentz,* 172 F. 2d 80, 81 (3d Cir. 1948). See also Art. 10, La. Civ. Code.

Conclusion.

Shell has had more than its day in court. This case has been to the decisional level a total of five times. Shell

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* Shell is apparently contending, among other things, that Louisiana law is applicable because it is "the place where all material factors attending the Atlantic contract take place" (Petition, p. 12). Even if such an approach were justified, it would not result in the application of Louisiana law. Not only is Louisiana not the place of execution by either party or delivery of the contract, both obviously "material factors attending the Atlantic contract", but, in addition, Atlantic supplies an *interconnected interstate* pipeline system with gas. Moreover, the parties who executed the Atlantic contract in 1943—who were not Louisiana corporations, who did not have their principal offices in Louisiana, who did not execute the contract in Louisiana and who did not deliver the contract in Louisiana—certainly had no intention that Louisiana law or some purported anomaly of Louisiana law would govern the Atlantic contract or nullify the obligation to supply gas for the life of the contract (Item E, R. 267, 278, 279).

is now asking this Court for a sixth decision on issues which are purely commercial and private in nature. We submit that this Court should finally put this litigation to rest and deny the petition for a writ of certiorari.

Respectfully submitted,

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No. 399

In the Supreme Court of the United States

OCTOBER TERM, 1961

SHELL OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet. App. A–1—A–7) is reported at 292 F. 2d 149. The orders of the Federal Power Commission (R. 133–145, 153–161) are reported at 18 F.P.C. 617 and 19 F.P.C. 74.[1]

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1961 (Pet. App. A–8). The petition for a writ of certiorari was filed on September 12, 1961.

[1] Also relevant here are the prior opinion of the court of appeals and this Court's opinion reversing that court's judgment and remanding the case for decision on certain questions. These are reported at 263 F. 2d 223 and 363 U.S. 263, respectively.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the court below correctly held that, in the respects here relevant, Louisiana law does not differ from general contract law.

2. Whether, in the circumstances here presented, this Court should direct the suspension of this proceeding to await a decision by the Louisiana courts in the state action instituted by petitioner after the adverse judgment of the court of appeals.

STATEMENT

The petition in this case seeks review of the judgment of the Court of Appeals for the Third Circuit adjudicating certain questions remanded to it by this Court in *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263. The ultimate issue concerns the interpretation of a favored-nation clause of a natural gas sales contract dated May 1, 1951, between Texas Gas Transmission Corporation and Shell Oil Company (Shell contract)[2] and the effect under that clause of a price redetermination agreed to by Texas Gas with The Atlantic Refining Company in 1954 pursuant to a 25-year contract which had been executed on September 1, 1943 (Atlantic contract).[3] The back-

[2] The Shell contract was originally with Texas Gas' wholly-owned subsidiary, Louisiana Natural Gas Corporation. The corporations merged in June 1955 (R. 134).

[3] The Atlantic contract had initially been between Atlantic and the Defense Plant Corporation, an agency of the Federal

ground of the present controversy and the relevant facts are as follows:

1. After this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, holding sales of natural gas in interstate commerce by independent producers to be subject to the Natural Gas Act (52 Stat. 821, 15 U.S.C. 717, *et seq.*), the Commission directed such producers to file rate schedules showing their rates in effect on June 7, 1954, the date of that decision (18 C.F.R. 154.91, *et seq.*); in addition, all changes thereafter made were to be subject to the Commission's regulations and filing procedures under Section 4 of the Act.

In November 1954, Shell duly filed, as part of its rate schedule, its contract with Texas Gas. Pursuant to a requirement of the Commission's regulations (18 CFR 154.92) that it attach "a statement showing estimated sales and billing for the first month of service," Shell attached a copy of the credit statement for that month rendered by Texas Gas (which metered the gas) showing the rate actually being paid on that date was 8.997 cents per Mcf (thousand cubic feet) (R. 81). Shell also attached, however, a "sample" billing statement which purported to show that the correct rate was 12.5 cents (R. 80). The Commission, in January 1955, notified Shell that it would not accept the filing until an explanation of the effective rate was provided (R. 161–162).

Government, but Texas Gas (through its subsequently-merged subsidiary) had acquired all the latter's rights on May 11, 1949 (R. 125).

Shell took no action until February 1957, when, in filing a new rate schedule prospectively changing its rate for the sale to 16.75 cents,[4] it again claimed that its effective rate on June 7, 1954, was 12.5 cents. This claim was based on the ground that the February 22, 1954, Atlantic price redetermination setting that price (*i.e.*, 12.5 cents per Mcf) for gas delivered by Atlantic to Texas Gas under the 1943 Atlantic contract had triggered the favored-nation clause of its contract with Texas Gas (R. 116). The Commission directed a hearing to determine the validity of Shell's claim with regard to the rate in effect on June 7, 1954 (R. 116–117).

2. The favored-nation clause of the Shell contract provides (R. 63–64):

> If at any time after December 31, 1951, Buyer [Texas Gas] shall enter into a contract providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller [Shell] of such fact, and if the price per one thousand (1,000) cubic feet at any time pay-

[4] The Commission suspended the proposed 16.75-cent-rate, pending a determination of its reasonableness, in a proceeding which is still pending before the Commission. That rate (based upon the triggering of the favored-nation clause in Shell's contract with Texas Gas by another purchase of gas by Texas Gas admittedly made under a new contract within the meaning of the favored-nation clause) went into effect after the expiration of the five-month suspension period, subject to the Commission's power to order refunds and rate reductions if the increased rate is ultimately found to have been unjustified. See Section 4(e) of the Act, 15 U.S.C. 717c(e).

able under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. * * *

At the time the Shell contract was made, Texas Gas was also buying gas from Atlantic under the Atlantic contract. Condition III of that contract specifies the price for gas delivered during the first five years of its 25-year term, and then goes on to provide (R. 87–88):

* * * * *

(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

(c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII.

Condition XII of the Atlantic contract provides (R. 93–94):

> In case the parties hereto shall be unable to agree on any question or dispute arising under this contract, such question or dispute shall be referred for settlement to three arbitrators, one appointed by Seller, one appointed by Buyer, and the third appointed by the two others so chosen. The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrator shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of the said parties to the arbitration.
>
> The matter in question or dispute shall be submitted in writing to the arbitrators immediately upon the completion of their appointment, and the parties shall do all things necessary to make proper submission thereof according to the character of the question or dispute involved, or as required by the arbi-

> trators. The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same. * * *

The 1954 Atlantic price redetermination, as well as that made in 1948, was arrived at by agreement under Condition III of the Atlantic contract and without resort to arbitration machinery set out in Condition XIII.

3. After hearings, the Commission ruled that the 1954 Atlantic price redetermination had not triggered the Shell favored-nation clause, and accordingly concluded that Shell's effective rate in 1954 for its sale of gas to Texas Gas was unchanged from 8.997 cents which Texas Gas had been paying (R. 133–145). On review sought by Shell, the court of appeals, in its initial decision, set the Commission's order aside. 263 F. 2d 223.

The court assumed for the purposes of that decision that the Atlantic contract imposed an enforceable obligation for fixing prices for the subsequent five-year periods (263 F. 2d at 226). Nevertheless, the court held that the Shell favored-nation clause was intended to be triggered by price redeterminations pursuant to earlier (*i.e.*, pre-1952) gas purchase contracts as well as by prices fixed in entirely new contracts entered into thereafter. Accordingly, the court of appeals did not reach Shell's further argument that the 1954 Atlantic price redetermination necessarily involved the "enter[ing] into a contract" within the Shell favored-nation clause because the

provisions for price redetermination of the Atlantic contract were not, as Shell argued, legally enforceable.

In reversing the court of appeals, this Court made the same assumption as to the enforceability of the Atlantic contract. 363 U.S. at 271, fn. 8. Noting Shell's further argument based on the alleged non-enforceability of the Atlantic contract, the Court remanded this question for determination by the court of appeals. In addition, the Court adverted to the Commission's contention that, in any event, the question of enforceability was immaterial, and remanded this issue as well to the court of appeals. 363 U.S. at 276–277.

On remand, the court of appeals affirmed the Commission's order (Pet. App. A–1—A–7). While holding that the enforceability issue was material (Pet. App. A–2), the court ruled that the Atlantic contract was enforceable (Pet. App. A–5—A–7). With reference to Shell's contention that Louisiana law governed the enforceability issue, the court commented (Pet. App. A–7):

> * * * under our conception of the controverted document, Louisiana law, in this instance at least, does not differ from general contract doctrine. Therefore, abstract discussion of whether Louisiana law controls the enforceability of the Atlantic pact is not called for. * * *

ARGUMENT

Petitioner Shell does not question the principal holding of the court below, *i.e.*, that the 1943 Atlantic contract was enforceable under general contract law, so that the 1954 price redetermination was made in

accordance with the 1943 agreement and hence does not involve the "enter[ing] into of a [new] contract" within the Shell favored-nation clause. Instead, Shell urges that, under what it asserts to be applicable principles of conflict of laws, the enforceability of the 1943 Atlantic contract is controlled by Louisiana law rather than general contract law, and that Louisiana law, because of the alleged peculiarities of its Civil Code provisions, dictate a different result. The court below, however, found it unnecessary to reach this conflict of laws question since it concluded that in all material respects Louisiana law does not differ from general contract principles. There is, moreover, no reason to grant Shell's request to suspend these proceedings pending decision by the Louisiana courts in the action recently instituted by Shell. Shell's position on both matters is predicated upon alleged peculiarities of Louisiana law, and the questions are not of general importance.[5] There is no occasion for further review by this Court.

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[5] In an attempt to show general importance, Shell refers to the "thousands of independent producer gas sales contracts [which] have been filed as 'rate schedules' with the Federal Power Commission" (Pet. 9–10), and asserts that "* * * the recurrence of such questions before the Commission was urged by respondents in support of their successful petitions for writs of certiorari previously filed in this very case" (Pet. 10).

The questions earlier brought by the Commission to this Court were radically different and the Commission's petition expressly noted the lack of any general importance with regard to the enforceability question. See Petition for Writ of Certiorari in No. 170, October Term, 1959, p. 17, fn. 15. Indeed, at that time, when the questions presented were patently of far broader scope, Shell urged (Brief in Opposition in Nos. 167,

1. According to Shell, the issue which it "primarily * * * ask[s] this Court to review" is a question of conflict of laws—"whether federal substantive law or State law [of Louisiana] should govern" in the circumstances said to be involved here (Pet. 11). The judgment below, however, is based on general contract principles, not on a separate rule of federal substantive law (Pet. App. A–7). Shell's attempt to amalgamate the two by stating that "general contract doctrine" is merely a characterization adopted by the court below for federal substantive law (see Pet. 2, 11) is wholly unsupported. Moreover, and more significantly, the court below clearly did not decide any conflict of laws question, and none is presented by the case. In the view that in this instance Louisiana law did not differ from general contract doctrine, the court of appeals expressly held, as Shell reluctantly recognizes (Pet. 11), that there was no need for it to consider or pass upon the choice of law problems which Shell undertook to pose (Pet. App. A–7; *supra*, p. 8).

2. The content of the Louisiana law on the narrow point at issue is plainly not a question appropriate for review here. In any event, the conclusion of the court of appeals that Louisiana law on the point does not differ from general contract doctrine is not based on a misinterpretation of Louisiana law. In the relevant re-

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170, October Term, 1959, pp. 17–18, see also, pp. 11–14; cf. 363 U.S. at 268, 270):

"* * * [T]his is not a case of general importance but, in reality, is nothing more than a contract dispute between Shell and Texas Gas involving a privately negotiated contract in a unique situation * * *."

spects, the law of that state is the same as general contract doctrine, despite the differences in terminology.[6]

Shell argues that, despite the conceded enforceability of the Atlantic arbitration provision (see Pet. App. A–5), that contract, under Louisiana law, was not "enforceable for any of its five-year periods after the first, because there was no fixed and determined price; hence the contract was subject to a 'suspensive' condition * * * and was of no effect whatever, for any purpose, until the price was actually fixed. When that was accomplished by virtue of the February 17, 1954 agreement, a contractual obligation to sell and to buy gas was created" (Pet. 12–13). In so urging, Shell confuses a sale (*i.e.*, present transfer of title with its concomitant risks) with a contract to sell (*i.e.*, present agreement for future transfer of title), a distinction made in Louisiana as in common law jurisdictions. Thus, while under Louisiana law there may be no present enforceable sale in the absence of a fixed and determined price, contracts to sell containing arbitration provisions (such as that in the Atlantic contract) are enforceable in Louisiana as elsewhere and damages may be recovered for breach thereof. As stated in Hebert and Lazarus, *Some Problems Regarding Price in the Louisiana Law of Sales*, 4 La. L. Rev. 378 (1942), an article upon which Shell relies heavily (Pet. 19–21) (4 La. L. Rev. at 400–401):

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[6] Significantly, Shell, while contending for a contrary substantive ruling, urged in the court below that the Louisiana law was not dissimilar from general or federal law. See, *e.g.*, Reply Brief for Petitioner filed on remand in C.A. 3, No. 12568, pp. 11, 12, 15, 18.

> * * * It is true that one of the parties may refuse to comply with his obligation of appointing the estimator and thus has it within his power to nullify the agreement; but the contract is nonetheless binding, even though it cannot be effective as a sale until and unless the parties have named arbitrators and they have fixed the price. That the contract is ineffective if the parties only agree to designate the experts afterwards, is true only to the extent that there is no sale. However, the contract is binding upon the parties to the extent that should either one refuse to comply with his obligation to appoint the appraiser, which is an obligation to do, he will subject himself to damages for the breach thereof.
>
> The rule announced in the *Werner* case should therefore be qualified by the foregoing. What was evidently intended was that the sale was unenforceable as such, but that the obligation to name the experts was nevertheless binding. * * *[7]

In the *Werner* case (*Louis Werner Sawmill Co.* v. *O'Shee,* 111 La. 817), the parties had left the price for timber lands to be fixed by two estimators, one to be appointed by each party with no provision for resolving disagreements between them. When the estimators could not agree, the buyer sought specific performance, alleging bad faith and requesting the court to appoint an estimator. The Louisiana court, pointing to the obvious defects of the arbitration

[7] See, also, Comment, *Certainty of Promise in the Law of Sale,* 30 Tul. L. Rev. 568, 569–570 (1956); Smith, *Civil Code and Related Subjects (Particular Contracts),* 16 La. L. Rev. 242 (1956).

scheme, held that there was no sale, and quoted with approval from the commentator Marçadé (111 La. at 822):

> "What is essential," says Marcadé, Comm. on art. 1592, C.N., "is that the parties should have bound themselves in such way that the price may be thereafter determined as a mere consequence of the consent given by them, without any new act of volition on their part. If, for example, after the parties had said that the sale was made for a price as to which they would agree thereafter, they added, or which, in case of disagreement, should be fixed by an expert to be appointed by the parties themselves or by the judge of the district, it is clear that there would be a sale, since it would no longer be within the power of the parties to prevent the fixing of the price. The result would be the same if, without expressing themselves thus explicitly, the parties had, however, manifested the idea of leaving matters to the courts, if need were, to name one or more experts; but, when nothing indicates such a consent, the fixing of the price will have to be by the expert or experts that the parties will have designated, and if one of them refuses, or dies, or is unable to make the estimation, there will be no sale, the condition upon which it depended not having materialized."

Thus, while recognizing the possibility that a valid obligation to arbitrate price can, like any other contractual obligation, be frustrated by chance circumstances, the Louisiana court has held that a contract containing an arbitration provision under which it would no longer

be within the power of either party unilaterally to prevent the fixing of the price is enforceable.[8]

Inasmuch as the fixing of the price under the arbitration provision of the Atlantic contract cannot be prevented by one of the parties, that contract fully meets the Louisiana standards of enforceability. Condition XII of the Atlantic contract provides that if the parties are unable to agree upon the price, either one can name an arbitrator by notice to the other. Within ten days, the second party is empowered to designate a second arbitrator and a third arbitrator is to be named by the first two within a second ten days. If either party fails to designate an arbitrator, the one chosen "shall arbitrate the question alone". If two arbitrators are appointed and they cannot agree on the third, the latter "* * * shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of the said parties to the arbitration". See *supra*, pp. 6–7.

3. Shell's further suggestion that the instant pro-

[8] *Barber Asphalt Paving Co.* v. *St. Louis Cypress Co.*, 121 La. 152 (Pet. 17–19), is not to the contrary. In that case, the Louisiana court, in denying the validity of what is commonly known as a conditional sale, said that payment of the price could not be the condition precedent of a sale (i.e., passage of title) but rather that a sale was a condition precedent to the *obligation* to pay the price. At the same time, however, the court made it clear that parties to a contract can subject themselves to binding obligations to perform certain acts as conditions precedent to a sale. There are no conditions precedent here to the obligation to submit the price to arbitration if the parties were otherwise unable to agree.

ceedings should be held in abeyance, pending decision by the Louisiana courts in the action instituted by Shell after the decision below in this case (Pet. 21–24), is similarly lacking in merit. The ordinary practice, at least in cases which do not involve constitutional issues, is that federal courts will adjudicate state law issues arising in controversies properly before them; only in special and exceptional circumstances will resolution be suspended pending state decision. See, *e.g.*, *Propper* v. *Clark*, 337 U.S. 472, 489–492; cf. *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 160–162.

The special circumstances of this case strongly support the conclusion that its disposition should not be deferred. This controversy dates back at least to November 1954 when Shell, in filing the contract with the Commission as a rate schedule, first claimed entitlement to the 12.5-cent price in its "sample" billing statement (R. 80). In addition, Shell has been aware since March 1957 when the Commission set this matter for hearing (R. 116–117) that the Commission intended to adjudicate the controversy. Shell actively participated in these hearings, introducing witnesses and filing briefs, and when the Commission's decision was unfavorable, it was Shell which initiated the instant court proceedings by seeking review in the court below. This case has already been the subject of two decisions on the merits by the court of appeals (263 F. 2d 223, 292 F. 2d 149, Pet. App. A–1—A–7) and one by this Court (363 U.S. 263).

Despite the fact that it has pressed the alleged peculiarities of Louisiana law at every opportunity throughout these proceedings, Shell has never previously filed an action in the Louisiana courts, much less suggested suspension of the federal proceedings to await decision in Louisiana. It was only after the adverse decision below that Shell instituted an action in the Louisiana courts (which is still pending undecided) and made its present suggestion in this Court. The suggestion clearly comes much too late.

Moreover, rejection of Shell's suggestion will not "bring about the area of friction between the State and Federal judiciaries which this Court has said should be avoided" (see Pet. 22–23). Although the issues involved in the Louisiana case appear to be identical to those raised here, that case is still undetermined, while the Commission and the court of appeals have issued final decisions.* If certiorari is denied, settled doctrines would dictate that the decision in this case would be binding in the Louisiana action. *City of Tacoma* v. *Taxpayers,* 357 U.S. 320; *Stoll* v. *Gottlieb,* 305 U.S. 165; *Commissioner* v. *Sunnen,* 333 U.S. 591,

* *Leiter Minerals, Inc.* v. *United States,* 352 U.S. 220, cited by Shell (Pet. 23), involved special and exceptional circumstances inasmuch as a state interpretation of its local statute might have eliminated a constitutional question. In addition, the proceedings in both the state and federal courts were still in their preliminary stages.

597–599; *Cromwell* v. *County of Sac*, 94 U.S. 351, 352–353.[10]

[10] Should certiorari be granted, the Commission will further urge in support of the judgment below that, despite the court's contrary ruling, the issue of enforceability was in fact immaterial. Whether an agreement such as that embodied in the 1954 Atlantic price redetermination would trigger the Shell favored-nation clause depends in the first instance upon the intention of the parties to that contract. That these parties did not so intend, irrespective of the enforceability of the Atlantic contract, is apparent from this Court's earlier opinion in this case. The Court commented that the language of the favored-nation clause, "enter into a contract" was used elsewhere in the Shell contract in a context showing that these words "meant to the parties the making of a full-fledged contract containing all the terms defining the complete relationship" (363 U.S. at 273). Further noting the usual complexity and comprehensiveness of gas sales contracts, this Court found that the 1954 price redetermination embodied in the simple one-page letter specifying only a price was not "the making of a full-fledged contract"; accordingly, the Court concluded that the periodic price adjustment under the Atlantic contract did not "partake of the nature of 'enter[ing] into a contract providing for the purchase * * * of gas,' within the meaning of the language of the Shell 'favored nation' clause" (363 U.S. at 274).

Moreover, apart from this Court's prior opinion, practical considerations also indicate the immateriality of the enforceability question. It is highly unlikely that the parties to the Shell contract intended the "enter into a contract" language in the favored-nation clause to exclude only those price redeterminations made pursuant to pre-existing contracts which were technically binding and enforceable. This would conflict with the parties' obvious purpose to provide a simple, practicable standard for determining when the favored-nation clause had been triggered. Shell's interpretation would defeat this purpose by making that determination complex and difficult, involving as it would possible conflict of laws and like problems.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1961.

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No. 399.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

SHELL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION, TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS & ELECTRIC COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY OF PETITIONER TO RESPONDENTS' BRIEFS IN OPPOSITION.

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Respondents attempt to belittle the general importance of this case by ignoring the circumstance that the question of enforceability, in the posture of this proceeding, of necessity involves a conflict of laws question as to what law governs the enforceability of a rate schedule on file with the Federal Power Commission. In view of the *Phillips* decision* and its aftermath of the vast number of privately negotiated gas sales contracts which have been and will continue to be filed as "rate schedules", it is unrealistic to contend, as do respondents, that the question of what law governs construction and enforceability of such "rate schedules", is not of general importance.

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* *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672 (1954).

The Court of Appeals saw fit to rely upon "general contract doctrine" which, in the light in which the case was briefed and argued to it, was but a characterization by the court of the federal substantive law concept which it felt should govern. True, the court said, but without citation of a single authority, that "Louisiana law, in this instance at least, does not differ from general contract doctrine". Thus the court assumed, without coming to grips with the problem, that Louisiana law was the same as general contract doctrine. Respondents claim that the court below actually applied Louisiana law.*

Assuming, *arguendo*, that the court below reached its conclusion by specifically applying Louisiana law, its conclusion is in conflict with the settled statutory and judicial law of Louisiana and should not be permitted to stand. If it does, it will create unnecessary friction between State and Federal judiciaries.

Respondents, though they accuse us of being confused as to the law of Louisiana in that we, they say, are incapable of distinguishing between sale and contract to sell, demonstrate their own complete misconception of the Louisiana doctrine of suspensive condition. Respondents argue, in effect, that if a contract "of sale" is subject to a suspensive condition, it can none the less be valid as a "contract to sell".

Respondents are under a serious misapprehension as to the suspensive condition in a *sale* and in a *contract to sell.***

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* Br. for Government, p. 10; Br. for Texas Gas & Louisville, p. 14. In this latter brief it is said (p. 14) that the court below "under Louisiana law specifically" held the Atlantic contract to be enforceable.

** Respondents speak of the right to recover damages. That misses the issue of whether there was an enforceable contract to buy gas. Further, we deny that in Louisiana an action for damages would lie. *Louis Werner Sawmill Co.* v. *O'Shee*, 35 So. 919 at 921; *Lake* v. *LeJeune*, 226 La. 48, 74 So. 2d 899.

The Louisiana law is crystal clear that in either one, i.e., a sale or a contract to sell, fixed price is an absolute essential to enforceability. If in a purported sale the price is not fixed but is subject to uncertainty as to its fixing, the sale is of no effect until the price is fixed. If the document is a purported contract to sell (as the Atlantic contract was), but is subject to uncertainty as to the fixing of the price, it is of no effect as a contract to sell, unless and until the price is actually fixed. LSA-C.C. Arts. 2462, 2456 and 2021, and the authorities discussed in our petition, leave no doubt about this.

Respondents impute to us an argument we have never made, and then set about to destroy it. They in effect say that we say that if the Atlantic contract did not constitute a sale for 1953-1958 until price was fixed, it did not constitute a contract to sell. We have said no such thing. On the contrary, we have said that the Atlantic contract purported to be a contract to sell gas in the future and it was not enforceable as a contract to sell gas until the price was actually fixed (obviously it was not enforceable as a sale either).

Respondents have apparently read LSA-C.C. Art. 2021 and concluded that the requirement to meet and discuss price or to submit the matter to arbitration is an "*obligation*" and is not subject to a suspensive condition. But the point which they completely overlook is that the term "*obligation*" as used in Article 2021 and in the Civil Law, *is synonymous with contract.** That Article is not speaking

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* The term "obligations" as used in the Louisiana Civil Code is synonymous with contract. *Morgan's La. & T. R. & S. S. Co. v. Stewart*, 119 La. 392, 44 So. 138, 143 (1907): "Civil obligations . . . are of two kinds: (1) . . . , (2) Such as arise from the consent of the parties who are bound by them which are called contracts or conventional obligations." See also 58 C. J. S., *Modern Civil Law*, p. 840, "The law of obligation has a broader meaning in the civil law than in the common law in that 'it signifies rights as well as duties. . . .'."

of the promises that may be made by either party to a contract but rather of the contract itself that is made to depend on an uncertain event. If, as in this case, the contract is a "promise to sell" it cannot be effective or enforceable as a promise to sell in the absence of a price. Here the naming of the price, the missing essential element of the promise to sell, is referred to the future and it is made to depend on an uncertain event. Thus the promise to sell is subject to a suspensive condition and cannot come into effect until the condition is satisfied. Although admittedly the parties promised to meet and discuss price at or before a specified time, and even to submit the price to arbitration if one party timely invoked it, yet the fixing of price was an "uncertain event" because neither the meeting of the parties nor the arbitrators was certain to result in fixed price.*

In summary, if the price, whether in a sale or contract to sell, is left to future negotiations, or to arbitration, the sale or contract to sell (whatever it purports to be) is subject to a suspensive condition and is of no effect whatever, and gives rise to no enforceable rights, until the condition is satisfied and the price is actually fixed. See the authorities cited in our petition and also: *Wampler* v. *Wampler*, 239 La. 315, 118 So. 2d 423 (1960).

Petitioner is quite serious in urging the propriety of this Court directing the court below to hold this case in abeyance pending determination by the Louisiana court of the single issue of Louisiana law on which, petitioner

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* Texas Gas and Louisville say that it is not the law of Louisiana that a price mechanism must be immune from every possible frustration, even by causes beyond the whim or caprice of the parties. They fail to recognize that the feature which makes a contract subject to a suspensive condition is not that the condition is uncertain because of the whim or caprice of the parties *but simply because it is uncertain for whatever reason.*

submits, this case depends. It is true, as we readily recognized in our petition, that in *Propper* v. *Clark*, 337 U. S. 472, this Court said that the federal courts cannot allow difficulty of an issue of state law to deter them from deciding the case, when the issue comes to them in diversity and federal question cases—matters expressly charged to them by Congress.

The rationale of the *Propper* case, however, emphasizes the propriety of referral to the state court here. Our request is supported by *Thompson* v. *Magnolia*, 309 U. S. 478. In *Propper*, this Court said of referral to state courts:

> "This suggested procedure has been followed in order to avoid a decision on a Federal constitutional issue . . . and where the only issue in the case was one of state law, although Federal jurisdiction was based on the Bankruptcy Act, 11 U. S. C. A. 51 *et seq.* Thompson *v.* Magnolia Petroleum Co., 309 U. S. 478, 60 S. Ct. 628, 84 L. Ed. 876."

In *Thompson* v. *Magnolia*, the Court directed its trustee to file suit in the state court. Here suit in the state court is already pending, and there is every assurance that it will go to final determination as it presents to the state court, not a request for an advisory opinion, but a demand for $117,584.85, which petitioner sincerely believes is due it under its contract with Texas Gas for deliveries prior to June 7, 1954.

The only real resistance to the request for abstention offered in the Government's brief is the statement (p. 16):

> "If certiorari is denied, settled doctrines would dictate that the decision in this case would be binding in the Louisiana action."

Apart from the fact that this does not seem the appropriate place to raise the plea of *res judicata* concerning another

case pending before a different court, the authorities cited in support of that statement do not bear it out. In fact, one of the cited cases, *Commissioner* v. *Sunnen*, 333 U. S. 591, destroys the position asserted. Here the issue is the price of gas on June 7, 1954 when the Commission first assumed jurisdiction, whereas in the state court proceeding petitioner sues for the price of gas sold prior to June 7, 1954. Involved in the *Sunnen* case was tax on income under a patent contract. The Court held that a decision by the Board of Tax Appeals with respect to tax liability on income from a patent license contract was not binding in a subsequent case involving a different tax year, but presenting complete identity of facts, issues and parties.

For the reasons herein and in the petition for certiorari, it is respectfully submitted that the petition should be granted.

Respectfully submitted,

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October 17, 1961.